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MAY 2020 – FIRE & EMS LAW Newsletter

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LEGAL LESSONS LEARNED:

34 NEW CASES – INCLUDING 4 CORONA VIRUS COURT DECISIONS (see CHAP. 13)

Contents

FL: POLICE CANINES – BOTH ALERTED BODY ODOR IN CAR - MURDER CONVICTION UPHELD - *DAUBERT* STANDARD

On April 22, 2020, in Cid Torrez v. State of Florida, the District Court of Appeal of the State of Florida (Fourth District), held (3 to 0) that the trial court properly allowed two police detectives and an expert witness to testify that the dogs alerted to human body odor in trunk of defendant's vehicle. The defendant was convicted of murder of his wife, even though her body was never discovered. The Court found canine evidence admissible under the *Daubert* standard [U.S. Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals (92-102), 509 U.S. 579 (1993)].

Judge Mark W. Klingensmith, in his decision for the Court, cited Bob Dylan song:

> "The evidence of the reliability of a dog's alert is "readily understood by a jury." … Or as Bob Dylan once said, "you don't need a weatherman to know which way the wind blows." BOB DYLAN, Subterranean Homesick Blues, on BRINGING IT ALL BACK HOME (Columbia Records 1965)."

Facts:

> "Torrez was married to the victim, his wife Vilet Patricia Torrez ('Vilet'). In September 2011, Torrez moved out of the family home after a domestic incident in which he was violent towards Vilet. Although Torrez and Vilet were still married, they lived separately from that time on; Vilet stayed in the family home with the children and Torrez moved to an apartment.
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> Surveillance from a security camera showed Vilet in her vehicle entering the gate of her neighborhood in the early morning hours on the day of her disappearance. A neighbor's video surveillance camera also confirmed that Vilet's vehicle was on the street at that time. This was the last time that Vilet was seen or heard from. Records of Vilet's cell phone showed that her last phone calls were made at the same time that morning to Torrez's cellphone. Days later, Torrez called 911 to report Vilet missing. Law enforcement determined that Vilet neither conducted any financial activity, nor travelled after that date. Crime scene technicians found numerous blood stains on the staircase, the wall next to the staircase, and the light switch in the children's bedroom inside Vilet's home. The DNA profiles obtained from the sampled blood from the residence had a mixture of two individuals: Vilet and Torrez.
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> The investigation into Vilet's disappearance proceeded over several months. Almost five months after their initial canvas of the suspected crime scene and surrounding area, Officer Strickland and Jewel were asked to help again. This time they deployed in the rear parking lot of a police station where there were several vehicles, including one owned by Torrez. Officer Strickland slightly opened the doors and trunks of the vehicles and Jewel again showed a behavioral change next to the rear door of Torrez's car consistent with an alert to the odor of human remains. When Jewel came to the car's trunk, she nudged it open further and jumped inside. Jewel sniffed between the floor of the trunk and the back seat and went into her trained final response, which tells the handler that she was as close as possible to the trained odor of human remains. Jewel also gave a trained final response to the odor of human remains in the backseat of the car.
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> Another search was done by Detective Juliana Martinez who worked as a full-time detective and part-time canine handler with the Palm Beach County Sheriff's Office ('PBCSO"). Det. Martinez and Canine Piper assisted with a search of Torrez's vehicle independently of the search that Officer Strickland and Jewel performed. Piper also alerted, or exhibited a change in behavior, to the outside rear door of the vehicle and came to a final response at the seam of the rear door. Piper exhibited the same

change in behavior at the trunk and gave another final response when she sniffed the seam of the trunk."

Holding:

"We recognize, as did the trial judge, that the admission of cadaver dog evidence has not yet been considered by the Florida appellate courts. For our review of the admissibility of cadaver dog evidence, we consider the trial court's application of *Daubert* to the facts of this case.

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For cadaver dog evidence to be admissible, each dog's ability and reliability should be shown on a case-by-case basis. Courts should not merely assume that any well-trained dog can detect specific odors, but instead should understand that a dog's abilities, whether innate or acquired, is a fact which may be proven by evidence like any other fact."

Legal Lessons Learned: The *Daubert* standard must be met for expert testimony, including testimony by canine handlers.

Note: The U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), involved a lawsuit alleging that birth defects might have been caused by pregnant women taking Bendectin for anti-nausea. The federal judge granted summary judgment to Merrell Dow, finding plaintiff's expert testimony was not based on medical studies of humans, but based "upon 'in vitro' (test tube) and 'in vivo' (live) animal studies that found a link between Bendectin and malformations." The Supreme Court remanded the case, and directed the judge to decide if the plaintiffs' experts met Rule 702 of the Federal Rules of Evidence, which provides (in part):

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise...."

The U.S. Supreme Court applied those standards in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), involving steel belted radial tire on a minivan, where passenger was killed. The Court rejected the plaintiff's tire expert: "Applying these standards, we determine that the District Court's decision in this case—not to admit certain expert testimony—was within its discretion and therefore lawful."

File: Chap. 1, American Legal System

U.S. SUP. CT: CRIMINAL CONV. MUST BE UNANIMOUS JURY – LOUISIANA, OREGON 10-2 UNCONSTITUTIONAL

On April 20, 2020 in Evangelisto Ramos v. Louisiana, the U.S. Supreme Court (6 to 3) set aside prior court precedent from 1972, overturned Ramos's conviction for second-degree murder, and life imprisonment. Six Justices agreed on setting aside the conviction, but 4 of the 6 wrote concurring opinions outlining different legal reasoning. Louisiana and Oregon are the only states allowing convictions on less than unanimous verdicts (implemented in Louisiana in 1898 out of concern about African American jurors on jury; Oregon in 1930s implemented out of concern of KKK members getting on jury). Louisiana in 2019 started requiring unanimous verdicts for crimes committed in 2019 or later. Presumably they will re-try Ramos (an oil-supply boat worker, who admitted having consensual sex with 43-year old Ternice Fedison the night before her body was stuffed into a garbage can).

"On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one be-fore us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is Reversed."

Facts:

"Accused of a serious crime, [murder in second degree] Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond reasonable doubt; they voted to acquit. In 48 States and federal court, a single juror's vote to ac-quit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole."

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[From Brief of Ramos]:

"In November 2014, a woman later identified as Trinece Fedison was found dead by a New Orleans police officer. Her body was stuffed into a trash can that ordinarily sat outside of a church but had been moved across the street into a nearby alley. She had been stabbed, and her pants were around her ankles and her shirt pulled up to her chest…. The day before, Ms. Fedison's nephew Jerome had seen Ms. Fedison near the church, chatting with (in his words) a 'Spanish' man. Ms. Fedison had then entered a house with the man. So, after hearing about his aunt's death, Jerome returned to that street. Upon seeing petitioner Evangelisto Ramos walk out the front door of the house, Jerome approached and cornered him. 'I know what you did,' Jerome warned. 'You gonna [sic] feel me, partner, for real.'

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Frightened for his life, Mr. Ramos left home and spent the next few nights in a trailer near the dock where he worked. He told his manager that he had had sex with a woman who had later been found dead and that a family member of the victim had approached him on the street and threatened to kill him…. The manager encouraged Mr. Ramos to contact the police. Mr. Ramos agreed, and the manager arranged an interview…. .In the interview, Mr. Ramos told the investigating detective that the night before Ms. Fedison was found dead, he had had consensual sex with her at his home…. . He added that they had had sex several times before. That night, Mr. Ramos continued, Ms. Fedison had left his house and climbed into a black car with two men who had flagged her down….

Mr. Ramos also voluntarily agreed to provide a DNA sample. Resulting lab reports indicated that Mr. Ramos was one of three sources of DNA found on the trash can in which the victim's body had been found…. When the detective returned to ask Mr. Ramos about this, Mr. Ramos told him that he had placed a bag of garbage in the church garbage can after Ms. Fedison left his house, while on his way to the corner store….

The State's case against Mr. Ramos [for second-degree murder] was based on circumstantial evidence. The State stressed that Mr. Ramos had been seen with the victim the day before her death and that he had admitted he had touched the garbage can in which her body was found…. But the State presented no eyewitness or physical evidence directly linking Mr. Ramos to the killing. Even though police officers had thoroughly searched Mr. Ramos's home (where, under the prosecution's theory, the violent crime would

presumably have taken place), the police had found no murder weapon, blood from Ms. Fedison, or any trace physical evidence.

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Upon learning of the jury's divided vote, Mr. Ramos moved for a new trial. Renewing a claim the court had rejected at the outset of trial, he argued that the U.S. Constitution requires a unanimous verdict for conviction…. The court overruled the motion and entered a guilty verdict…. Mr. Ramos was sentenced to life in prison without the possibility of parole."

Holding: [Justice Gorsuch wrote Majority opinion]

"Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the
supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.

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Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries." In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a
motivating factor in the adoption of their States' respective nonunanimity rules. We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense."

Dissent: [Justice Alito]

"Nearly a half century ago in Apodaca v. Oregon, 406 U. S. 404 (1972), the Court held that the Sixth Amendment permits non-unanimous verdicts in state criminal trials, and in all the years since then, no Justice has even hinted that Apodaca should be reconsidered. Understandably thinking that Apodaca was good law, the state courts in Louisiana and Oregon have tried thousands of cases under rules that permit such verdicts. But today, the Court does away with Apodaca and, in so doing, imposes a potentially crushing burden on the courts and criminal justice systems of those States. The Court, however, brushes aside these consequences and even suggests that the States should have known better than to count on our decision."

Legal Lessons Learned: Our Nation will now be uniform – unanimous jury verdicts will be required to convict (or to acquit).

File: Chap. 1, American Legal System

OH: FIRE CODES - TWO FIRES AT RECYCLING CENTER – LARGE PILE OF CONSTRUCTION DEBRI - INJUNCTION

On April 16, 2020, in State ex rel. Yost v. Baumann's Recycling Ctr., L.L.C., 2020-Ohio-1504, the Ohio Court of Appeals for Eight Appellate District (Cuyahoga County), held (3 to 0) that the trial court properly issued an injunction. On June 13, 2019, the trial court granted Ohio Attorney General's lawsuit seeking an injunction, after a bench trial.

"Here, the evidence of record indicated that the disputed pile of C&DD materials had not decreased in size since 2011. The judge properly found that this was not temporary. Further, the evidence demonstrated that the material was producing steam vents from active decomposition, so the court could properly conclude that the material was not 'substantially unchanged' or 'retrievable.' Therefore, the court did not err in rejecting BRC's claim that it simply engaged in permissible storage in connection with its 'processing' of C&DD within the facility exclusion from the requirements for C&DD 'disposal' set forth in R.C. Chapter 3714."

Facts:

"This matter concerns various entities owned by William Baumann. Defendant Baumann's Recycling Center, LLC ('BRC'), operates a construction and demolition debris ('C&DD') recycling facility on Chaincraft Road in Garfield Heights, Ohio.

On January 3, 2019, following a fire at the Chaincraft Road recycling facility, the Garfield Heights Fire Department issued a stop-work order…. The following week, the Ohio Environmental Protection Agency ('EPA') conducted a site visit. The EPA director ('Director') later issued Final Findings and Orders that provided in relevant part, as follows: 'The Facility is neither licensed nor permitted as a construction and demolition debris C&DD disposal facility or solid waste disposal facility.'

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The matter proceeded to trial on May 21, 2019. Lt. Joseph Warner ('Warner'), fire safety officer of the Fire Prevention Bureau of the Garfield Heights Fire Department testified that he conducted a site inspection in October 2018, after observing a large wood pile. He provided the facility's employees with the portions of the fire code that applied to the wood pile, but was unable to set up a time for a follow-up inspection. Several months later, on January 2, 2019, a 'track hoe fire' occurred in the middle of the C&DD pile. The fire department experienced difficulties in reaching the fire, and accessing water. The fire was extinguished, and Warner admitted that the materials beneath the track hoe were not burning. However, after the fire Warner observed steam coming from different points within the C&DD pile, indicating that decomposition was occurring. Warner issued a stop-work order for the facility, the first such orders issued by the department in 'years.' Warner also emailed the EPA and requested a site visit.

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William Baumann, owner of the facility, testified that he disputed the EPA's application of the term 'solid waste,' and the materials then stockpiled after that time. He also disputed the EPA's regulation of the RSM materials that he believed could be reused. He opined that he has spent $500,000 in complying with EPA orders, and another $500,000 would be needed to remove the C&DD pile.

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On June 13, 2019, the trial court granted the Attorney General's motion for a preliminary injunction. The court determined that BRC and BEI operated or maintained an unlicensed C&DD facility, that defendants illegally disposed of or allowed the illegal disposal of C&DD on the property, and that defendants dumped or permitted the dumping of solid waste at the site. The court further concluded that defendants' illegal disposition of C&DD created "a significant fire hazard to the community" and "a condition that constitutes a public nuisance.'

Holding:

"Rather, this matter plainly involved allegations of 'disposing' of a 'massive amount' C&DD that was allegedly decomposing, making the site dangerous and unsafe, and creating an imminent fire hazard.

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C&DD must be disposed of in a licensed C&DD facility, solid waste facility, certain types of open burning, or other approved methods that do not constitute a nuisance, health hazard, or pollution. See Ohio Adm. Code 3745-400-04(A)."

Legal Lessons Learned: The FD wisely called in the Ohio EPA, and when the owner did not promptly act to remove the fire hazard, the Ohio AG obtained an injunction.

Note: See article, Jan. 27, 2020: "Garfield Heights Recycling Center Held in Contempt of Court for Failing to Address Hazard,".

File: Chap. 1, American Legal System

DC: JUROR'S PRE-TRIAL FACEBOOK POSTS - ANTI-TRUMP POSTS – CONVICTION UPHELD - NOT ABOUT DEFENDANT

On April 16, 2020, in United States v. Roger Stone, Jr., U.S. District Court Judge Amy Berman Jackson denied the defense motion for new trial. On the pre-trial Jury Questionnaire, the juror [she became foreperson of the jury] was asked about any social media posts the jury may have posted about the House of Representatives' investigation of President Trump. The juror truthfully wrote: "I can't remember if I did, but I may have shared an article on Facebook. Honestly not sure." The Court denied the motion: "The motion is a tower of indignation, but at the end of the day, there is little of substance holding it up."

> "The defendant has not shown that the juror lied; nor has he shown that the supposedly disqualifying evidence could not have been found through the exercise of due diligence at the time the jury was selected. Moreover, while the social media communications may suggest that the juror has strong opinions about certain people or issues, they do not reveal that she had an opinion about Roger Stone, which is the opinion that matters."

Facts:

> "The [juror's Facebook] posts do not contradict the juror's answers to any other questions either. During the individual questioning of potential jurors on November 5, the Court asked the juror what she had read or heard about the defendant. She responded:
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> > So nothing that I can recall specifically. I do watch sometimes paying attention but sometimes in the background CNN. So I recall just hearing about him being part of the campaign and some belief or reporting around interaction with the Russian probe and interaction with him and people in the country, but I don't have a whole lot of details. I don't pay that close attention or watch C-SPAN.
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> During the individual voir dire on November 5, [2019] the juror answered questions posed by both the Court and the lawyers, and she was warm, open, and frank. The Court found her to be extremely credible, and the defense attorneys who had the opportunity to assess her demeanor and friendly presence in the courtroom chose to ask her only a handful of additional questions. Based on what they had read and what they observed, they did not move to strike the juror for cause, and they did not use a peremptory challenge to strike her from the jury pool. All of this suggests that they too found her to be believable, or that they had identified some other information in her questionnaire that made her an attractive juror for the defense, and they made a strategic decision to forego asking her more questions about Facebook or her opinions about Donald Trump.

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On November 15, 2019, the jury returned a unanimous verdict in the case of United States v. Roger J. Stone. It found the defendant guilty of seven crimes: one count of obstructing a Congressional investigation, in violation of 18 U.S.C. § 1505; five separate counts of making a false statement to the government in violation of 18 U.S.C. § 1001; and tampering with a witness, in violation of 18 U.S.C. § 1512(b)(1).

In the wake of those extraordinary developments [President Tweeted that he wanted shorter sentence recommended by U.S. Attorney's Office of 7 to 9 years], another juror spoke out. She expressed her respect and support for the prosecution team on Facebook, and she attached a copy of the first juror's opinion piece as well. The juror identified herself as the foreperson, and she released her post, along with her name, to the public. This prompted numerous people to search the internet for publicly available information about the author. It didn't take long: they came across several Facebook and Twitter posts that mentioned the Special Counsel's investigation and several that included negative comments about President Trump, and two days later, the defendant filed this motion. Defendant contends that he is entitled to a new trial because this "newly discovered evidence" reveals that the foreperson answered questions falsely on her written juror questionnaire and when she was questioned in the courtroom, and that by doing so, she concealed the fact that she harbored bias against him. He also seeks a new trial based on an allegation that the juror engaged in misconduct during deliberations, tainting the verdict."

Holding:

"As for the second basis for the motion for new trial – juror misconduct – defendant contends that the juror did not comply with the Court's instructions because her social media posts reveal that during the period between the completion of the questionnaire and the verdict, she was aware of some developments in the news concerning the President or politics. But there was no prohibition against reading or discussing news in general or even news about the President: the jurors were told to turn away from any publicity concerning the case. For that reason, the defense conceded at the hearing that the juror did not transmit any posts during the trial in violation of the Court's instructions not to communicate about the case."

Legal Lessons Learned: Juror's use of social media is not a basis for setting aside the verdict, unless the posts deal with the case on which they are serving.

Chap. 1: American Legal System

IA: FIRE INVESTIGATION - TOASTER FIRE – STATE FARM INSURANCE PROPERLY REFUSED PAY HOMEOWNER

On April 6, 2020, in Bryan Jones and Sarah Jones v. State Farm And Casualty Company, U.S. District Court Judge Leonard T. Strand, Chief Judge, U.S. District Court for the Northern District of Iowa, Western Division, granted summary judgment to State Farm and dismissed the lawsuit. The insurance company refused to pay for the fire damage when evidence showed that paper was put in the toaster, it was turned on and a roll of paper towels was left on top of the toaster. Former co-workers of Sarah Jones also informed State Farm about suspicious comments.

"In short, there is undisputed evidence that the fire started at the toaster, that a paper-like material was observed on top of the toaster after the fire and that the toaster was in the 'on' position. There is also unrebutted expert opinion evidence that a defect in the toaster, or in the home's electrical system, could not have caused the fire and that the fire could have been started by putting paper products in and on the toaster. On this record, and regardless of plaintiffs' denials, no reasonable jury could find that the fire was accidental.

As such, and as a matter of law, State Farm did not breach the insurance contract by denying coverage for the loss that resulted from the fire."

Facts:

"State Farm has produced evidence, including expert opinions, demonstrating that this fire was not accidental and, indeed, could not have been accidental. Both Langholz and Carpenter, who were on the scene immediately after the fire, observed a fluffy layered material on the toaster that appeared to be a paper product. Langholz noted that the toaster was in the engaged, or 'on,' position. Plaintiffs do not dispute, or explain, this troubling evidence.

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In the early morning hours of November 11, 2017, a fire occurred in plaintiffs' home in Milford, Iowa, that originated from a toaster in their kitchen. Doc. No. 11-1 at 1, 7. According to Sarah, she awoke at 4:02 a.m. due to noises coming from her kitchen. *Id.* at 2. After failing to determine the cause of the noise from camera feed on her phone, she opened her bedroom door to go to the kitchen. *Id.* She could only see "white" outside the door. *Id.* After closing and reopening the door she began to smell smoke. *Id*. She went to the kitchen, saw flames and then went to gather her children. *Id*. She claims that smoke alarms began going off as she and her children were leaving the house. *Id*. She told her children to call 911 and proceeded to call Bryan from her cell phone. Id. Bryan had left the home sometime between 3:40-3:55 a.m. and had not noticed any indication of a fire at that time. Id. at 3. Sarah and her children sat in their van to wait for the fire department. Id. Sarah posted a video of the fire to Facebook at 4:17 a.m. Id.

The Milford Fire Department (MFD) received the fire call at 4:10 a.m. and arrived at the home at 4:20 a.m. Id. After extinguishing the fire and entering the home's kitchen, Shane Langholz, a volunteer firefighter, observed a fluffy and flaky 'block, almost square . . . three to four inches thick' on top of the toaster. Id. at 6-7 (quoting Doc. No. 11-3 at 150-51). He thought it was some sort of paper product. Id. at 6. He also observed that "[o]ne knob of the toaster was stuck down." Id. (quoting Doc. No. 11-3 at 152). Langholz then asked Jim Carpenter, MFD's Chief, to observe the 'strange-looking ash pattern on top of the toaster.' Doc. No. 11-3 at 148. Carpenter saw something 'kind of light and fluffy, more like tissue paper or something laying across the top of the toaster.' Id. at 6 (quoting Doc. No. 11-3 at 148). It was layered and fluffy and about an inch or inch and a half thick. Id. He thought the ash was very strange. Id.

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Bryan denied using the toaster that morning and stated the last known use occurred the previous afternoon. *Id*.

Two weeks before the fire, plaintiffs purchased a homeowner's policy from State Farm. *Id.* They submitted their insurance claim to State Farm on the day of the fire. *Id.* at 1.

Nine days after the fire, George Howe, a fire inspector, examined the damage in the home. Doc. No. 11-1 at 7. He concluded that the fire originated along the wall behind the toaster on the countertop. *Id.* He believed that the fire was caused by an electrical malfunction with the toaster's cord because 'plug blades for the power cord on the toaster were arced off inside the electrical outlet.' *Id*. He did not observe any identifiable remains of paper products inside of or on top of the toaster. Doc. No. 15-2 at 2. However, State Farm notes that the unusual material on top of the toaster was inadvertently destroyed before Howe's investigation when firefighters performed some demolition in the home. Doc. No. 16-1 at 3.

Eleven days after the fire Rosanna Swart, a former co-worker of Sarah's, contacted State Farm with concerns about Sarah's comments and behavior after the fire. Doc. No. 11-1 at 1. In a recorded statement to Stacy Niemann, an investigator for State Farm, Swart said she saw Sarah shopping with her children only hours

after the fire. Id. at 4. Swart stated that Sarah was purchasing unseasonal clothing and appeared 'nonchalant' about the fire earlier that morning. Id. Sarah did not appear disappointed and, in fact, seemed 'upbeat,' 'exuberant' and 'happy to be shopping.' Id. at 5. Swart stated that Sarah told her the fire started at the toaster in the kitchen. Id.

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Swart also told Niemann about suspicious comments Sarah had allegedly made to Rosemary Shaughnessy, another of Sarah's former co-workers. Thus, Niemann contacted Shaughnessy as well. Doc. No. 11-1 at 5. Shaughnessy told Niemann that Sarah had made statements to her that one could start a fire by placing tissues in a toaster and that toasters were the number one source of fires in a home. *Id*. at 5-6. Jenny Schiltz, another former co-worker who spoke with Niemann, also reported that Sarah had said that sticking tissue paper in a toaster could start a fire. *Id*. at 6. Sarah denies that she ever made statements about starting a fire by putting tissues in a toaster, though she admits that she made the statement about toasters being a common source of house fires, a fact she had recently learned from someone else. Doc. No. 15-1 at 3. Plaintiffs assert that they did not start the fire or help anyone else do so.

Based on these reports from Sarah's acquaintances, and plaintiffs' own reports, State Farm decided to further investigate the fire. Doc. No. 11-1 at 7. It hired Dan Choudek, an electrical engineer, to determine whether

the fire had been caused by an electrical malfunction with the toaster. *Id*. Choudek ultimately concluded that the toaster had not malfunctioned. *Id*. He stated that the arcing identified by Howe was a result of the fire, not an internal defect of the toaster. *Id*. He did not find any product recalls, or other reported issues, that would cause him to suspect the toaster started the fire on its own. *Id*. at 8. His own testing also did not indicate that simple operation, or even a malfunction, of the toaster could produce sufficient heat or flame height to ignite surrounding items in the kitchen. *Id*. However, the testing revealed that a paper product inside the toaster, along with a tall fuel source on top of the toaster (such as a vertical-standing paper-towel roll), created sufficient heat and flame height to ignite cabinets above the toaster within approximately four minutes. *Id*.; Doc. No. 15-1 at 4.

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State Farm asked Howe to review Choudek's findings. Doc. No. 11-1 at 9. Howe agreed with Choudek that his previous conclusion regarding arcing in the toaster's electrical cord was incorrect and deferred to Choudek's finding that neither the cord nor the plug caused the fire. *Id*.; Doc. No. 11-3 at 185. Based on his prior investigation, as well as Choudek's findings, Howe concluded that it was 'possible' that the fire was caused by paper products being put in and on top of the toaster, as was done during Choudek's test. Doc. No. 11-1 at 9. However, based on standards set by the National Fire Protection Association (NFPA), Howe concluded that the cause of the fire must be classified as undetermined. Doc. No. 15-2 at 2.

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Based on its investigation, which revealed additional information that will be discussed below, State Farm concluded that the plaintiffs intentionally started the fire."

Holding:

"As the summary judgment movant, State Farm has met its initial burden on this question by 'identifying those portions of the record which show a lack of a genuine issue.' *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323). State Farm has produced evidence, including expert opinions, demonstrating that this fire was not accidental and, indeed, could not have been accidental."

Legal Lessons Learned: Insurance companies wisely use experts to investigate suspicious claims. The U.S. District Court judge added this footnote at the end of his decision about prior arson conviction of Bryan Jones.

> Footnote 4: "Plaintiffs dispute the admissibility of certain other evidence State Farm discovered during its investigation. For example, plaintiffs were experiencing serious financial difficulties, Bryan has a prior arson conviction, Sarah had submitted a prior fire loss claim and Bryan had once reported a vehicle stolen but it was located a short distance away and had been set on fire…. It is not necessary to consider this evidence to conclude that plaintiffs have failed to meet their burden of producing evidence from which reasonable jurors could find that the fire was accidental or that they did not intentionally start the fire. As such, I need not resolve the admissibility issue. I do note that evidence of these additional facts would almost certainly be relevant, at minimum, for purposes of determining whether State Farm acted in bad faith in denying coverage, if that claim could otherwise proceed to trial."

File: Chap. 1, American Legal System

U.S. SUP. CT: POLICE USED "COMMON SENSE" – DRIVER WITH REVOKED LICENSE - REASONABLE SUSPICION

On April 6, 2020, in Kansas v. Charles Glover, Jr., held (8 to 0) in an opinion by Justice Clarence Thomas that the Deputy Sheriff on patrol, who runs a license plate and learns owner of vehicle has revoked driver's license, used his "common sense" and had "reasonable suspicion" to make a traffic stop of the male driver. The trial judge had granted defense motion to suppress, which the Court of Appeals reversed. The Kansas Supreme Court, however, agreed with the trial judge, finding the Deputy Sheriff did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to "only a hunch." Fortunately the U.S. Supreme Court reversed the Kansas Supreme Court.

"Because it is a 'less demanding' standard, 'reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause.' Alabama v. White, 496 U. S. 325, 330 (1990). The standard 'depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Navarette, supra, at 402 (quoting Ornelas v. United States, 517 U. S. 690, 695 (1996) (emphasis added; internal quotation marks omitted)). Courts "cannot reasonably demand scientific certainty . . . where none exists." Illinois v. Wardlow, 528 U. S. 119, 125 (2000). Rather, they must permit officers to make 'commonsense judgments and inferences about human behavior.' Ibid."

Facts:
"Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense infer-ence that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

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On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995. Chevrolet 1500 pickup truck with Kansas plate 295ATJ…. Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickup truck…. Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas."

Holding:
"[W]e have stated that reasonable suspicion is an 'abstract' concept that cannot be reduced to 'a neat set of legal rules,' Arvizu, 534 U. S., at 274 (internal quotation marks omitted), and we have repeatedly rejected courts' efforts to impose a rigid structure on the concept of reasonableness, ibid.; Sokolow, 490 U. S., at 7–8.

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For the foregoing reasons, we reverse the judgment of the Kansas Supreme Court, and we remand the case for further proceedings not inconsistent with this opinion."

Legal Lessons Learned: Excellent "common sense" decision.

File: Chap.1, American Legal System

CA: FIRE INVESTIGATION - HOMEOWNER CONFESSED - PROS. DELAYED DISCOSURE OF LAB RECEIPTS – NO HARM

On April 3, 2020, in The People v. Lincoln Testro Smith, the Court of Appeal of California (Second Appellate District / Division Five) held (3 to 0) in an unpublished decision, that trial court properly refused to instruct the jury about late disclosure of 75 pages of lab receipts, since the disclosure the night prior to the second (and last) day of trial was made prior to the LA County Sheriff's senior criminalist's testimony, did not cause any harm to the defense. Defense already had his two page report, and did not request a continuance of the trial.

> "[T]he prosecution's explanation for the discovery delay offered at trial did not reveal any willful misconduct. And most importantly, the defense was unable to articulate any concrete disadvantage occasioned by the production of the data and notes underlying West's [Michael West, a senior criminalist with the Los Angeles County Sheriff's Department, two page] summary report (which had been timely produced) before West testified."

Facts:

> "On December 2, 2016, firefighters responded to defendant's home. The first firefighters on the scene entered the house and began putting out multiple fires throughout the structure. More firefighters arrived and found defendant near the detached garage of the home, climbing a ladder to the roof. Once defendant was on the roof, he placed a rope around his neck and jumped, but he was not injured or killed. As defendant was swinging from the garage by the rope, one of the firefighters saw a young girl, later identified as defendant's daughter, run out of the back door of the home and enter a parked car in the driveway. Another firefighter approached the car and saw defendant's daughter inside along with a young boy (defendant's son) secured in a car seat. The firefighter removed the children from the car and took them away from the scene…. Defendant then jumped from the garage into a nearby tree. Once in the tree, defendant removed his clothing and threatened to jump, saying he was 'Jesus' and that 'he needed to kill himself to save you from your sins.' After around two hours, defendant was coaxed down from the tree and transported to a hospital.
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> Three days after fire and police personnel responded to the fire at defendant's home, police detectives interviewed defendant.1Defendant confessed to starting the fires in his home. He said he first took his children out of the house and put them in the parked car in the driveway before going into the garage to attempt to hang himself. When that failed, defendant said he took lacquer thinner from the garage and poured

it throughout the house. He further admitted starting multiple fires in his home by various methods: using a lighter, igniting a Mylar balloon, and throwing Molotov cocktails.

Fire Captain Scott Burnside (Burnside) led the forensic arson investigation. He found that there had been seven independent fires inside the house. *** Burnside took samples of fire debris, liquid from the lacquer thinner can, the can itself, and a lighter found in the back yard for the Los Angeles County Sheriff's Department crime lab to analyze.

Michael West (West), a senior criminalist with the Los Angeles County Sheriff's Department, tested those samples for 'the presence of ignitable liquids.' West found that three of the fire debris samples and the liquid from the lacquer thinner contained acetone, which is an 'ignitable liquid' and 'commonly found as an industrial solvent.' West drafted a two-page report summarizing his findings, which was timely disclosed to the defense before trial, but (as we next discuss in more detail) West did not turn over some of the underlying test data and other materials to the prosecution until shortly before he was to testify at defendant's trial.

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The evening before the second and last day of trial, when West was set to testify, the prosecution emailed defense counsel 75 pages of scientific data that was the basis for West's summary report. According to the prosecutor, she had asked West for 'lab receipts' and as soon as she received West's data in response, she emailed it to defense counsel. Defense counsel complained about the late production of discovery and asked the trial court to consider excluding West's testimony. She stated a continuance may not be 'appropriate given where we are in the jury,' and because going over the new discovery would 'probably. . .take some[ ]time.' If the court was not inclined to exclude the testimony, she requested the court give 'a late discovery[jury]instruction.'"

Holding:

"In his briefs on appeal, defendant argues the late production of material prevented a defense expert from reviewing the documents, 'which was the only way to determine if the documents truly did not disclose any information useful to the defense.' 'Such generalized statements are insufficient to demonstrate prejudice.' (People v. Verdugo(2010) 50 Cal.4th 263, 281-282 [no prejudice found where defense counsel asserted that '[t]imely disclosure of the information would have enabled counsel to adjust his theory of the case to fit the facts,' since counsel did not explain what he 'would have done differently' absent the discovery delay];see also Mora, supra, 5 Cal.5th at 469.)

This is especially true when the defense was timely provided with West's summary report, which indicated certain forensic testing had been done and gave the defense all the incentive it needed to pursue its own forensic analysis, if it believed that were important (notwithstanding defendant's recorded confession), to challenge West's findings."

Legal Lessons Learned: Defense counsel is entitled to expert reports, and lab receipts, prior to trial. In this case, was no continuance requested, and no harm.

File: Chap. 2, LODD / Safety

MI: FF LODD – VACANT HOUSE FILE – MURDER CONV UPHELD - DEF. PAID EMPLOYEE BURN HOUSE, INSURANCE

On April 16, 2020, in People of State of Michigan v. Mario Willis, the State of Michigan Court of Appeals, in an unpublished opinion, held (3 to 0) that after jury convicted defendant of second-degree murder in death of Detroit Firefighter Walter Harris and arson. The defendant paid an employee to set fire to a home owned by defendant's girlfriend. The house had been damaged in a previous fire, and defendant's girlfriend had received insurance proceeds to repair the damage. Court of Appeals remanded case for resentencing, so trial judge can explain why he imposed an enhanced minimum sentence. The original sentence was "500 to 750 months for the second-degree murder conviction and 10 to 20 years for the arson of a dwelling-house conviction."

> "[J]ust as we are not persuaded that defendant must have wielded an instrumentality personally, we are also not persuaded that its intentionally harmful use must only be directly and immediately against a person. The jury convicted defendant of second-degree murder based on his involvement in burning the house. The jury therefore implicitly found that defendant did use the gasoline as an offensive instrumentality against a person, even if that use against a person was indirect and achieved by way of destroying property. Furthermore, as noted, the victim, a firefighter, was not an unforeseeable hapless bystander and did not choose to encounter the danger; rather, the victim entered the burning structure specifically because his duties required him to do so. Thus, under the circumstances, we find harmless the trial court's failure to make an express factual finding as to defendant's intent in using the gasoline. We therefore reject defendant's argument that the gasoline was not a 'weapon' for purposes of OV 1.

Facts:

> "This case arises from an incident where defendant paid his employee, Darian Dove, to set fire to a house owned by defendant's then-girlfriend, apparently to avoid loss of the home to foreclosure. The house was empty when the fire was set. Firefighters arrived, entered the home and one of them, Walter Harris, was killed when a ceiling collapsed onto him. Defendant was charged with arson of a dwelling-house and second-degree murder on the theory that he had acted in wanton and willful disregard of the likelihood that setting the fire would naturally tend to cause death or great bodily harm.
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> Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and arson of a dwelling-house, MCL 750.72. He was acquitted of first-degree felony murder, MCL 750.316(1)(a). The sentencing guidelines as initially scored recommended a minimum sentence between 180 months and 300 months. He was originally sentenced to 500 to 750 months for the second-degree murder conviction and 10 to 20 years for the arson of a dwelling-house conviction."

Holding:

> "The death of firefighter Harris was a tragedy caused by defendant's criminal acts and the guidelines allow for a very harsh minimum sentence, more than 30 years. The trial court, however, elected to impose a sentence more than six years above the guideline's maximum-minimum and did so without providing adequate grounds. The trial court focused primarily on defendant's total OV score. However, the vast majority of those points were attributable to the offenses themselves. That is, anyone who committed the crimes defendant was convicted of would have a similar score. Thus, the high OV score, in and of itself, did not provide adequate grounds to sentence defendant more harshly than others guilty of the same crime. Further, the trial court only considered the seriousness of the offense and ignored the background of the offender, whose record and post-conviction activities suggest a sentence within the guidelines range. For those reasons, we conclude that the trial court did not adequately justify its decision to impose the departure sentence.

***

We vacate defendant's sentences and remand for resentencing or for the trial court to issue an order clearly articulating its reasons for the departure and its extent. We retain jurisdiction.

***

Defendant is by no means assured of release after having served his minimum term. The parole board may elect to deny him parole in which case he would have to serve his maximum term of 50 years."

Legal Lessons Learned: When the defendant hired his employee to burn of structure, both the employer and the employee can be convicted of murder and arson.

Note: Read NIOSH Fire Fighter Fatality Investigation Report, F2008-37 Date Released: January 31, 2010: "On November 15, 2008, a 38-year-old male fire fighter (the victim) died after being crushed by a roof collapse in a vacant/abandoned building."

File: Chap. 3, Homeland Security

NY: TERRORIST – FINGERPRINTS ON BOMB'S PACKING TAPE – CROSS EXAM. FBI EXAMINER NOT ON SPAIN CASE

On April 16, 2020, in United States of America v. Muhanad Mahmoud Al Farekh, the U.S. Court of Appeals for Second Circuit (New York) held (3 to 0) that trial judge properly reviewed FBI classified documents *ex parte* (without defense counsel), and properly prohibited defense counsel to cross-examination of FBI fingerprint examiner about another FBI fingerprint case 16 years earlier involving attacks on commuter trains in Madrid, Spain. [Note: In May, 2004, the FBI arrested Brandon Mayfield, and Oregon attorney, as a material witness in an investigation of the terrorist attacks on commuter trains in Madrid, Spain in March, 2004. The FBI Laboratory identified Mayfield's fingerprint on a bag of detonators in Madrid. Two weeks after Mayfield's arrest, the Spanish National Police identified an Algerian as the source of the fingerprint, and Mayfield was released from custody.]

"[T]he District Court did not preclude Al-Farekh from highlighting the possible subjectivity of, and potential flaws in, fingerprint evidence through his cross-examination of Sibley. To the contrary, Al-Farekh had the opportunity to do just that. Sibley testified, for example, about the 'level of subjectivity in latent print comparisons' and about the potential for mistakes by examiners in making false positive identifications. Other than being unable to rely on the Mayfield case and the report of the Department of Justice's Office of Inspector General prepared on that case, Al-Farekh was free to attack Sibley's methodology and fingerprint examinations as a type of evidence."

Facts:

"The Government's case against Al-Farekh included classified material. On June 30, 2016, the Government filed an *ex parte* classified motion for a protective order pursuant to § 4 of CIPA [Classified Information Procedures Act], which Al-Farekh opposed. On August 23, 2016, after reviewing the classified materials, the District Court granted the Government's *ex parte* motion…. Specifically, we hold that, in the circumstances presented here, the District Court did not err in adjudicating the Government's CIPA motions *ex parte* and in camera … and limiting the cross-examination of the Government's fingerprint examiner.

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Al-Farekh is a U.S. citizen who was born in 1985 in Houston, Texas and was raised in the United Arab Emirates. Between 2005 and 2007, Al-Farekh attended the University of Manitoba in Canada. According to the Government, Al-Farekh dropped out of college; traveled to Pakistan; joined al-Qaeda; became a senior leader of the terrorist organization; and was responsible for, among other things, conspiring to perpetrate a violent attack against civilian and military personnel in a U.S. military base in Afghanistan.

***

On January 19, 2009, two vehicles carrying vehicle-borne improvised explosive devices ('VBIED') approached Forwar d Operating Base Chapman, an important U.S. military base in Afghanistan. The plan was for the first vehicle to detonate its VBIED at the gate so the second vehicle could detonate its significantly larger and more powerful VBIED inside the base and maximize the number of casualties and damage. The first VBIED exploded as planned, injuring several Afghan nationals and a U.S. soldier; the second vehicle was stuck in the crater caused by the first VBIED and did not explode. The driver of the second vehicle was shot and killed after abandoning the vehicle. Latent fingerprints and a hair follicle were recovered from adhesive packing tape in the undetonated VBIED.

***

The evidence against Al-Farekh included the testimony of an FBI fingerprint examiner, Kendra Sibley, who concluded that 18 latent prints recovered from the adhesive packing tape in the undetonated VBIED matched Al-Farekh's fingerprints.

Al-Farekh argues that the District Court erroneously precluded him from properly cross-examining Sibley. Specifically, Al-Farekh challenges the District Court's exclusion of evidence relating to the Brandon Mayfield incident of May 2004, where FBI examiners examined one latent print in connection with a terrorist attack on the commuter trains in Madrid, Spain, and erroneously identified the fingerprint to be that of Mayfield, a U.S. citizen residing in Oregon."

Holding:

"First, the misidentification of Mayfield is only marginally relevant to the Government's case against Al-Farekh. The fingerprint examiners in the Mayfield incident were not involved in the instant case. And the Mayfield case involved only one print that was examined 16 years before the trial of Al-Farekh, whereas 18 latent prints were recovered from the undetonated VBIED and examined in this case.

Second, the District Court did not preclude Al-Farekh from highlighting the possible subjectivity of, and potential flaws in, fingerprint evidence through his cross-examination of Sibley. To the contrary, Al-Farekh had the opportunity to do just that. Sibley testified, for example, about the 'level of subjectivity in latent print comparisons' and about the potential for mistakes by examiners in making false positive identifications. Other than being unable to rely on the Mayfield case and the report of the Department of Justice's Office of Inspector General prepared on that case, Al-Farekh was free to attack Sibley's methodology and fingerprint examinations as a type of evidence.

***

Here, the District Court's limitation on the cross-examination of Sibley is consistent with the understanding that a defendant may attack the subjectivity of fingerprint examinations as a category of evidence, but is not entitled without more to rely on a fingerprint examiner's mistakes in a wholly unrelated case to undermine the testimony of a different examiner.

***

Since the examiners in the Mayfield case bear no relation to the examiners in Al-Farekh's case, we see no error in the District Court's conclusion that marginally relevant evidence relating to a separate case with no factual connection to Al-Farekh might confuse the jury and, therefore, should be excluded."

Legal Lessons Learned: Congress enacted the Classified Information Procedures Act to authorize federal judges to protect from public disclosure classified information. Regarding fingerprint examination, defense counsel may vigorously cross-exam expert witnesses, but not on a mistake by other FBI examiners that occurred 16 years prior.

Note: See DoJ, Inspector General report on the Spanish investigation.

File: Chap. 3, Homeland Security

MD: CIA / DOD – FORMER EMPLOYEES MUST HAVE "PRE-PUBLICATION REVIEWS" – LAWFUL, EVEN IF SLOW

On April 15, 2020, in Timothy H. Edgar, et al. v. Daniel Coats, et al., U.S. District Court Judge George J. Hazel, in a 57-page decision, granted the U.S. Government's motion to dismiss. Each the five plaintiffs signed agency security agreements, requiring when the left government a prepublication review ("PRR") of their books and other future publications. They each complained that CIA and other agencies took too long to conduct the reviews, and deleted too much information that may have been embarrassing to the government but was not classified. Judge Hazel followed the U.S. Supreme Court's precedent in Snepp v. United States, 444 U.S. 507 (1980), where Frank Sneep, a former CIA analyst in Saigon wrote a book in 1977 about the fall of Saigon, "Decent Interval" without getting prior clearance, and was ordered to turn over all proceeds from the book.

"While the allegations Plaintiffs have made about the inadequacies and breadth of the challenged PPR regimes do not appear inaccurate or implausible, *Snepp* remains the precedent governing the Court's evaluation of Plaintiffs' First Amendment claim, and Plaintiffs have failed to demonstrate that the regimes do not meet its low threshold of reasonableness. Accordingly, Plaintiffs' First Amendment claim will be dismissed.[10]

*** Footnote 10. It also bears mention that the wholesale reforms to PPR that Plaintiffs seek to obtain from the Court in this claim strain at the limits of the judiciary's role, particularly given the national security context. See Egan, 484 U.S. at 530 (1988). Both that concern and the Court's inability to sidestep *Snepp* limit the force of arguments made in the amicus brief submitted by CERL, which describes how lengthy PPR delays chill contributions to public discourse by former officials and discourage national security experts from entering the government…. Whatever the merits of these assertions, they are more properly directed to the branches of government empowered to create and execute public policy rather than to simply evaluate its consistency with the Constitution."

Facts:

"Former national security professionals Timothy H. Edgar, Richard H. Immerman, Melvin A. Goodman, Anuradha Bhagwati, and Mark Fallon ('Plaintiffs') bring this action against the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, and the Director of the National Security Agency ('Defendants'), challenging the constitutionality of the agencies' prepublication review ('PPR') regimes, which require current and former employees to submit materials they intend to publish to the agencies if they concern certain subjects. The Complaint, ECF No. 1, alleges that the regimes are void for vagueness under the First and Fifth Amendments and violate the First Amendment by

investing the agencies with excessive discretion to suppress speech and failing to include necessary procedural safeguards."

Holding:

"The Court notes that they have also failed to link the redactions and excisions from their own works that they allege were arbitrary and discriminatorily motivated to a challenge to the PPR regimes as a whole. … Nor have they responded to Defendants' observation that no Plaintiff has pursued judicial review of a PPR decision, as they are entitled to do. See, e.g., Berntsen v. CIA, 618 F. Supp. 2d 27 (D.D.C. 2009). While the Court appreciates the delay in publication that judicial review could entail, Plaintiffs have not demonstrated that such a delay on its own renders the PPR regimes constitutionally infirm, nor that review in a specific case would not be a more effective means of reviewing the alleged vagueness of a given PPR policy than a facial challenge. In any event, because none of the avenues that Plaintiffs have pursued for their vagueness claim are viable, the claim will be dismissed."

Legal Lessons Learned: Prepublication reviews are enforceable. per U.S. Supreme Court's decision in in Snepp v. United States, 444 U.S. 507 (1980).

Note: When Frank Snepp was sued, he had already received about $60,000 in advance payments from his publisher. The U.S. Supreme Court held (6 to 3), "We agree with the Court of Appeals that Snepp's agreement is an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure,' 50 U.S.C. § 403(d)(3). 595 F.2d at 932."

File: Chap. 3, Homeland Security

FL: ACTIVE SHOOTER - PULSE NIGHTCLUB – 49 KILLED, 53 INJURED – CAN'T SUE THE SECURITY GUARD COMPANY WHERE HE WORKED

On April 1, 2020, in Asael Abrad, et al. v. G4S Secure Solution (USA), Inc., the District Court of Appeal of Florida (Fourth District), held (3 to 0) that the trial court properly granted the security company's motion to dismiss; the shooter worked for the security company for 10 years, and plaintiffs alleged that the company knew he expressed a desire to commit acts of mass murder against members of the general public, particularly against members of the lesbian, gay, bisexual and transgender community. The lawsuit was dismissed since plaintiffs did not "sufficiently allege a legal duty owed by G4S."

"Appellants also concede that Mateen did not use weapons owned or controlled by G4S, but instead, weapons purchased by him on his private time. Appellants' argument that by fraudulently assisting Mateen in obtaining a Class G license—which in turn was helpful in purchasing the weapons used—is legally irrelevant…. Finally, Appellants' duty arguments fail for one more important reason: Appellants fail to provide any sort of limitation on the legal duty they seek to impose. Failing to provide any sort of boundary for the employer would have severe public policy implications. As both G4S and the trial court noted, Appellants' failure to provide any sort of spatial or temporal limits in the articulation of their concept of duty would essentially result in G4S being strictly liable and an absolute guarantor of Mateen's behavior while off duty at all times. See Garcia v. Duffy, 492 So. 2d 435, 439 (Fla. 2d DCA 1986) ('Once liability began to be imposed on employers for acts of their employees outside the scope of employment, the courts were faced with the necessity of finding some rational basis for limiting the boundaries of that liability; otherwise, an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against

any person under any circumstances. Such unrestricted liability would be an intolerable and unfair burden on employers.').

Facts:
"On June 12, 2016, Omar Mateen ('Mateen') entered Pulse and killed forty-nine people and wounded fifty-three others. The amended complaints alleged the following facts. At the time of the mass murder, Mateen was employed by G4S, after he was hired in September 2007 to work as a 'Custom Protection Officer.' Prior to employing and training him, G4S knew that Mateen had been dismissed from a corrections officer training class just months before for suggesting that he would bring a gun to class, specifically alluding to the then-recent mass shooting on the Virginia Tech campus.

***
[Plaintiffs alleged following.] "His position required him to carry a firearm while working, which in turn required him to obtain a Class G gun license issued by the State of Florida. To assist with obtaining the Class G license, G4S submitted a fraudulent psychological evaluation of Mateen. G4S also provided Mateen with an initial twenty-eight hours of training, including eight hours of firearms training at a gun range, followed by an annual four hours of renewal training thereafter. Appellants alleged that such training "contributed to M[ateen] not only becoming a proficient gun user, but also to becoming an expert marksman.

***
While Mateen was working under a G4S subcontract with the St. Lucie County Sheriff's Department to provide security at the St. Lucie County Courthouse, the Sheriff's Department demanded that G4S remove Mateen. The request was made because Mateen repeatedly threatened his colleagues, claimed to be in league with the terrorist groups al-Qaeda and Hezbollah, claimed to be associated with the Boston Marathon bombers, expressed a desire to martyr himself, and praised the actions of the Army major who shot forty-five people at Fort Hood, Texas.

***
Despite knowledge of the above-described incidents, G4S did not have Mateen undergo a psychological evaluation to determine his fitness to work as an armed security guard, but instead, moved him to another location. At his new jobsite, Mateen worked with another G4S employee who was a former police officer. The co-worker reported to G4S that Mateen was 'unhinged and unstable,' was in a constant state of anger, 'engaged in frequent homophobic and racist rants', and 'talked about killing people.' The co-worker made repeated requests to be transferred away from Mateen. When the repeated requests were ignored, the co-worker quit working for G4S.

***
Approximately two weeks before the massacre, Mateen attempted to purchase body armor and ammunition from a licensed gun dealer, without showing his Class G firearm license, and was turned away. Then, about a week later, he brought his Class G license to a different gun dealer and purchased the guns he later used in the massacre. Mateen's security licenses, including his Class G license, were a reason the dealer decided to sell the firearms Mateen used for the massacre."
Holding:
"We agree with G4S that 'Mateen was an individual with free agency who was outside of G4S's control and who committed crimes on his own time, with his own weapons and resources, at a location of his choosing.' *** Appellants have failed to demonstrate the trial court erred in dismissing the amended complaints for failure to allege a duty that is cognizable as a matter of Florida negligence law."

Legal Lessons Learned: Tragic event, but very difficult to hold employer liable for off-duty conduct of shooter.

File: Chap. 4, Incident Command

MD: FREELANCING – OFF DUTY VOL. FF - STRUCTURE FIRE – FIRED – CAN'T APPEAL TO COUNTY PERSONNEL BOARD

On April 9, 2020, in Ricardo Hinson v. Personnel Board Of Prince George's County, the Court of Special Appeals of Maryland, held (3 to 0) in an unpublished opinion that the trial court properly dismissed the volunteer firefighter's case; volunteers serve at will of FD, no right to hearing before County Personnel Board.

> "The dispositive question in this case is whether the County Code has granted volunteer firefighters the right to appeal disciplinary actions to the Personnel Board. We agree with the County and the Personnel Board that Hinson, as a volunteer firefighter, was not a County employee who had the right to appeal a personnel decision to the Personnel Board. Consequently, the Personnel Board did not commit legal error in dismissing Hinson's appeal."

Facts:

> "On September 19, 2015, a house fire broke out in Upper Marlboro, Maryland. One of the responding units was Engine 828 from the West Lanham Hills Volunteer Fire Department, of which Hinson was then a long-time member. By chance, Hinson was in the neighborhood at the time of the fire. He saw smoke and drove his personal vehicle to the burning house. When Hinson arrived at the scene of the fire, he did not report in to the Incident Commander. Instead, he took firefighting gear that belonged to the driver of Engine 828, and partially donned it. Hinson then grabbed a charged hose line, and began using it within the burning structure. Hinson was not wearing a breathing apparatus; his coat was never fastened; and he was not wearing a flame-
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> resistant Nomex hood(even though there was one in a pocket of the coat he was wearing).While working on the second floor of the structure without authorization to do so, Hinson suffered burns. He then caused a disturbance by resisting orders that he be transported to the Washington Regional Burn Center."
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> [From FD's investigation report.] "On February 23, 2016, a Disciplinary Review Board met and provided recommendations. During the hearing you ple[d] guilty to the Statement of Charges. You said you were in the neighborhood when you saw the smoke and when you got on the scene, you saw a house fire. You said you got on the scene, you saw that your engine was understaffed and you went to assist. You said you've learned a lot since the incident and were very apologetic for your past behavior.
>
> During the hearing you said your engine was understaffed[;] however, Engine 828 reported a staffing of four which is considered adequate staffing. You said you have been to all of your doctor's appointments, when in fact[,] the Department was notified that you were noncompliant with your doctor's visits. You said you were hitting hot spots[;] however[,] Assistant Fire Chief James testified that you were operating under a roof that was fully involved with fire. In reference to you not being properly dressed in your PPE while operating in an IDLH atmosphere, you said you were 'hot dogging it.'
>
> Assistant Fire Chief Finamore testified that on September 19, 2015, you failed to comply with several direct orders to have yourself evaluated. He said you did not comply until you were told to do so by your company chief, who was not on the scene of the incident nor was he in anyway involved with the incident. You said you have changed, yet you continue to display the same level of defiance that has brought you to this place.

This is not the first time that you have failed to comply with Departmental policies and procedures. A three year review of your history with the Department revealed the following information [7 incidents documented]."

Holding:

"Despite Hinson's efforts to persuade us that volunteers like him are actually employees in the Prince George's County 'classified service,' we are not persuaded that the Personnel Board has any authority to hear appeals filed by volunteer firefighters."

Legal Lessons Learned: Volunteer firefighters serve "at will" in most states, with no right to appeal to a County review board. "Freelancing" can have deadly results.

File: Chap. 4, Incident Command

NY: MASSIVE GAS LEAK – FDNY NOT EVACUATE HOUSES - BASEMENT LIGHT SWITCH, EXPLOSION – GOV. IMMUNITY

On Feb. 11, 2020, in State Farm Fire & Casualty Insurance Company, a/s/o Charles Caccse v. The Brooklyn Union Gas Company, d/b/a National Grid New York, and second lawsuit of State Farm v. The City of New York and FDNY, 2020 NY Slip Op 30876(U), Judge Tomas P. Aliotta, Supreme Court of New York (County of Richmond), granted the City & FD's motion to dismiss, since FDNY was performing governmental function involving discretionary judgments, and owed no "special duty" to the injured homeowner. The lawsuit against the gas company for defective gas mains may proceed.

"[I]n the opinion of this Court, the City and the FDNY have met their prima facie burden of establishing their right to judgment as a matter of law by submitting satisfactory proof regarding their claim of governmental function immunity and that no special duty existed between them and the plaintiffs. In opposition, plaintiffs have failed to rebut that showing and raise a triable issue of fact (see Zuckerman v. City of New York, 49 NY2d 557 [1980]). 'When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose' (Applewhite v. Accuhealth, Inc., 21 NY3d 420, 425 [2013]). If a municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty (see Applewhite, 21 AD3d at 426). Since police and fire protection are examples of long-recognized, quintessential governmental functions' (Matter of World Trade Ctr Bombing Litig., 17 NY3d 428 [2011]), plaintiff must plead and prove the existence of a special duty beyond the obligation owed to the public at large (see Valdez v. City of New York, 18 NY3d 69 [2011]).

Facts:

"[O]n January 29, 2014, [Charles] Caccese, who was not home at the time, received a phone call from his son, Caccese Jr., who advised him that he smelled gas in the house and that there was fire department activity on the street. When Caccese arrived home, he saw a National Grid truck and fire department vehicles on the street. He alerted a New York City firefighter that he smelled gas in his home, and firefighter Jose Saenz asked Caccese where his sewer trap was located. They both proceeded to walk downstairs to his basement to the utility room. When Caccese flipped the switch to turn on the light, an explosion occurred causing both Caccese and Caccese, Jr. to sustain serious personal injuries.

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State Farm further submits the deposition transcript of William Abell, a witness from National Grid who was present at the location on the date in question, along with hundreds of fire personnel. Mr. Abell testified that prior to the subject gas explosion, customers from all over the area were calling about gas leaks. Mr. Abell further stated that National Grid was in the process of taking the sewer caps off to let the gas out into the atmosphere. According to Mr. Abell, the main gas line had leaked on the day of the explosion. He described the main as old, antiquated and rotted, and opined that a pipe in that condition was not safe. He also indicated that the area near Delaware Street is known as gas leak-prone area, because the infrastructure is aged and needs to be changed, and that this condition had been documented in statistical records at National Grid. Mr. Abell testified that the subject gas leak was about 500-600 feet in size and that he had not seen one of this magnitude during his 37 years with National Grid.

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National Grid also submits copies of the deposition transcripts of, *e.g.*, National Grid and FDNY employees who were on-site at the time of the gas event, and fire incident reports, leak investigation reports, and photographs of the subject premises, all of which are said to corroborate the claim that it was Caccese's actions that proximately caused the explosion.

In particular, the testimony of FDNY Chief Mark Egan and Fire Marshall Zackary Fletcher and incident reports completed by them, all confirm that the sewer cap had been altered and a flood-guard device was installed on the street side of the sewer trap at the Caccese residence in violation of New York City Building and Plumbing Codes and that such violations were the sole proximate cause of gas entering the Caccese residence. According to National Grid, Caccese admitted during his deposition that he had retained a plumber to install a flood guard or check valve on the plumbing main drain line because he had flooding problems in the basement. National Grid argues that Caccese's actions were the proximate cause of the subject gas incident and not the actions of the moving defendants. Accordingly, it cannot be held liable for damages resulting from Caccese's negligence."

Holding:

"The City and the FDNY contend that no cause of action exists against either defendant for decisions made during an emergency operation unless a special relationship existed between these defendants and the plaintiff. However, plaintiffs have failed to allege the existence of any special duty in their Notice of Claim or within their complaint. Accordingly, any claims regarding the alleged breach of that duty must be dismissed. These defendants further contend that even if a special duty was properly raised in the pleadings, plaintiffs cannot prove the existence of a special duty in order to impose liability for the actions or omissions of the municipality.

These defendants argue that fire protection is a governmental function for which there can be no liability without the existence of a special relationship between the plaintiffs and the municipality. In this case, the City argues that plaintiffs have failed to submit proof establishing the elements required regarding the existence of a special duty, *e.g.*, there were no conversations between the FDNY and Caccese that can be construed as a promise, nor were there any other factors suggesting that the FDNY assumed a duty generating a justifiable reliance by plaintiff. In fact, the firefighter present at the scene merely asked where the sewer trap was located and said: "let's go take a look" when they were in Caccese's living room. In addition, proof further indicates that another firefighter was coming with a gas meter, but that Caccese was already on his way to the basement and immediately turned on the light switch, which caused the explosion to occur. Caccese was acting on his own accord, and not at the direction of the FDNY or anyone else.

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Here, the facts are sufficient to establish that the actions taken by the firefighters in regard to the subject gas leak were discretionary actions taken during the performance of their governmental function. As can be

gleaned from the deposition testimony of the fire department personnel, the firefighters were faced with varying circumstances as they inspected the neighborhood and each particular home. The testimony of firefighter Jose Saenz indicates that every call regarding a fire or gas odor/leak is treated differently, depending on the presenting circumstances, and every emergency is treated on a case-by-case basis. Accordingly, the decision-making process of the firefighters under the present circumstances undoubtedly required the exercise of discretion and judgment and, therefore, the City and the FDNY are entitled to immunity in this case. Plaintiffs have submitted no proof sufficient to rebut the Court's findings regarding the municipal defendants' judgment and discretion in this case."

Legal Lessons Learned: Governmental immunity for discretionary decisions at an emergency scene is a very important legal doctrine.

File: Chap. 6, Employment Litigation

KY: HARASSMENT OF ATHEIST FF – SUPERVISOR TOOK NO ACTION, URGED RESIGN - RETALIATION CASE REINSTATED

On April 22, 2020, in Jeffery Queen v. City of Bowling Green, KY, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that the U.S. District Court judge in Bowling Green improperly dismissed the retaliation lawsuit against the plaintiff's supervisor. The firefighter worked at Bowling Green FD for five years, and after one year he complained to his Supervisor. He was urged to quit, and no corrective action was taken; he finally resigned in May, 2016.

> "A reasonable jury could conclude that [the Supervisor] Rockrohr's subsequent conduct after receiving Queen's complaint about the harassment he faced at the Bowling Green Fire Department (which conduct included Rockrohr's suggestion that Queen 'should get employment elsewhere' because 'things [were] not working out') went far enough to amount to a materially adverse action. Indeed, Rockrohr's specific admonition made directly to Queen that he 'should get employment elsewhere' could be interpreted by reasonable jurors to convey the message that Queen was no longer welcome at the Fire Department, thus amounting to a constructive termination of Queen's employment."

Facts:

> "Queen worked as a firefighter for the City from September 2011 to February 2016. From the start, he was subject to harassment by his co-workers and supervisors because he is an atheist. His co-workers referred to him and other persons who did not espouse Christian beliefs as 'pagans,' a supervisor once stated that atheists 'deserve[d] to burn,' a second supervisor stated that he'd 'be damned if I work with [atheists],' and that same individual also stated that he was 'sure as hell glad none of those f[***]ers work here.' Queen's co-workers and supervisors also asked Queen what church he attended, and told him to join a church and get 'saved.' Furthermore, according to Queen, he was forced to participate in Bible studies with his co-workers, during which he was instructed to read specific Bible verses. Also, according to Queen, his co-workers and supervisors badgered him regarding his sexuality and regularly disparaged members of minority communities.
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> The complained-of conduct continued throughout the five years that Queen worked at the fire department, notwithstanding that he first brought it to the attention of a supervisor, Rockrohr, in 2012, approximately one year into the job. According to Queen, he 'complained to [Rockrohr] about some of those remarks that had

been said.' … Rockrohr 'responded in hostility and didn't take it well and kind of shut the conversation down and told [Queen] that [he] needed to remember [his] place.'

***

About a day or two later, Rockrohr told Queen that he had discussed the matter with the fire chief and they both believed that Queen "needed to get employment somewhere else." … When Queen asked why, Rockrohr answered that it was because Queen's 'EMT had expired.' Id. at 296. Rockrohr also advised Queen that 'things aren't working out for you, you need to look—be looking for something else,' and that they should both have a meeting with the fire chief. Id. Just before that planned meeting, however, Queen told Rockrohr that he 'was sorry' and 'would try to do better, try to fit in better.' Id. Rockrohr accepted Queen's apology and stated, 'if you can promise not to make any more problems... I'll forego the meeting with the chief... but you need to watch yourself, you're going to be on the radar for a while.' Id

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In February 2016, stress and anxiety from his colleagues' remarks caused Queen to take a leave of absence. While on leave, Queen received many phone calls from his supervisors asking why he was absent from work. Queen resigned in May 2016, and this lawsuit soon followed."

Holding:

"In reaching this decision, the district court noted that 'unlike the supervisor in [*Morris*] who simply chose not to investigate the plaintiff's claims, here Rockrohr went a step further, telling Queen he should seek other employment because it 'wasn't working out' for him to continue at the Bowling Green Fire Department.' Id. We agree with the district court that, based on *Morris* and subsequent decisions of this court interpreting KCRA, Rockrohr did not possess qualified immunity."

Legal Lessons Learned: When a firefighter complains of harassment, the Supervisor and the fire department has a legal obligation to promptly investigate and seek to stop any harassment behavior.

File: Chap. 6, Employment Litigation

AR: WORKER'S COMP DENIED - TESTICULAR CANCER – HAD AS YOUTH – NOT COVERED BY PRESUMPTION STATUTE

On April 21, 2020, Wesley Forbach v. The Industrial Commission of Arizona & City of Flagstaff, the Arizona Court of Appeal (Division One), held in unpublished opinion (3 to 0) that his surgery for removal of left testicle was not covered by worker's comp. The Arizona statutory presumption statute requires proof that the "carcinogen is reasonably related to the cancer." The proof was particularly difficult in this case since the firefighter as a teenage had testicular cancer and his right testicle was removed.

"The Administrative Law Judge ('ALJ') determined that Forbach was not entitled to a statutory presumption in his favor and, therefore, had not established a causal connection between his disease and his employment. We affirm."

Facts:

"[Wesley] Forbach is a firefighter for the City of Flagstaff. He is both a paramedic and an engineer for the fire department. The parties do not dispute that due to his duties with the fire department, Forbach has been exposed on multiple occasions to known carcinogens while on hazardous duty for at least five years…. When he was a teenager, Forbach was diagnosed with right side testicular cancer, and it was treated by

surgical removal. In April2018, Forbach was diagnosed and underwent surgery for left side testicular cancer. He returned to his normal duties at work after his recovery from the surgery. Forbach filed a worker's compensation claim with CopperPoint American Insurance Company('CopperPoint'), the City of Flagstaff's carrier, contending that his left side testicular cancer was a covered occupational disease. CopperPoint denied the claim, and Forbach requested a hearing.

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When he was a teenager, Forbach was diagnosed with right side testicular cancer,and it was treated bysurgical removal. In April 2018, Forbach was diagnosed and underwent surgery for left side testicular cancer. He returned to his normal duties at work after his recovery from the surgery.

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Dr. Mark Seby, Forbach's physician and a doctor who annually evaluates Flagstaff firefighters, testified that he evaluated Forbach's fitness to return to work after the surgery and released him back to work in June 2018. He had performed yearly physical exams of Forbach since 2009. Until April 2018, Forbach's medical evaluations had been negative for any subjective symptoms or objective findings suggesting the presence of cancer. Dr. Seby testified that there was a 'strong possibility' that the testicular cancer discovered in 2018 was related to Forbach's job as a firefighter. In particular, Dr. Seby testified to 'a strong possibility that [Forbach's] testicular cancer is related to those chemical toxins he's been exposed to as a firefighter.' He confirmed that diesel exhaust and benzene, which is a substance in diesel fuel and exhaust, are known carcinogens. Dr. Sebyalso testified that Forbach had reported to him annually that he was regularly exposed to toxins.

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CopperPoint [city's worker's comp administrator] called one witness at the hearing, oncologist Dr. Jason Sagalnik, who testified that he performed an Independent Medical Examination of Forbach in August 2018. He assumed that Forbach had been exposed to toxins as a firefighter 'based on the long list of inhalational, possibly dermal exposures that can be anticipated from his employment.' He agreed to assume exposure by Forbach to 'smoke, diesel exhaust, fire debris including plastics and rubber, gas, and chemicals.' Nevertheless, he stated that there is no scientific evidence that 'establishes a causal relationship between the occupation of firefighting and testicular cancer.' He admitted that some correlation had been shown, but stated that the correlation is not 'statistically significant.' Dr. Sagalnik testified that diesel exhaust is a known carcinogen for some cancers, including lung cancer, but not for testicular cancer."

Holding:

"Even granting, for the sake of argument, that Dr. Sagalnik has a bias, we find no evidence in the record that the ALJ did not take this into account and Forbach does not point to any such evidence. Forbach also attacks Dr. Sagalnik's testimony by arguing that it lacked foundation. He focuses on Dr. Sagalnik's statement that the state of medical knowledge is insufficient to show what caused Forbach's cancer, whether it was his occupation or not. Rather than take this as a statement that Forbach's position lacks admissible medical foundation as to causation of testicular cancer, as the ALJ did, Forbach argues that it makes Dr. Sagalnik's testimony speculative or equivocal. We reject this argument, as it has no basis. As stated in his testimony, Dr. Sagalnik's unequivocal position that there is no known relation between known carcinogens to which firefighters are typically exposed and testicular cancer is supported by current medical literature."

Legal Lessons Learned: Firefighters should keep a list of runs where they have been exposed to smoke or chemicals, but even with such a list, without a State statutory presumption statute that specifically includes testicular cancer, it is very difficult to prove what caused this particular cancer.

Note: Court described the Arizona statutory presumption.

> "Starting in 2001, with a significant amendment in 2017, the Legislature created a statutory presumption of industrial causation for firefighters and police officers who contract certain diseases under certain conditions. *** Arizona Revised Statutes section 23-901.01(B) lists diseases that, if contracted by firefighters or police officers, will be presumed to be occupational diseases that arose out of employment if the four requirements in subsection (C) of the statute are met….
>
> > '3. The firefighter or peace officer was [i]exposed to a known carcinogen as defined by the international agency for research on cancer and [ii] informed the department of this exposure, and [iii] the carcinogen is reasonably related to the cancer.'"

File: Chap. 6, Employment Litigation

NC: WORKER'S COMP. - DENIED FOR HEARING LOSS – MINOR MVA AMBULANCE - BACK INJURY WAS COVERED

On April 7, 2020, in Travis Martin v. WakeMed & Key Risk Management Services, the Court of Appeals of North Carolina held (3 to 0) in an unpublished opinion that the North Carolina Industrial Compensation properly denied the EMT's claim for loss of hearing in both ears.

> "The Commission found that the record evidence, including plaintiff's testimony, did not reveal plaintiff ever discussing a loud noise or a certain degree of noise during the motor vehicle accident sufficient to cause plaintiff to sustain asymmetric bilateral hearing loss. Moreover, the motor vehicle collision on 13 April 2016 "'resulted in only minimal damage to [the vehicle plaintiff was driving].' Based on the preponderance of evidence in view of the entire record, the Commission found that 'insufficient evidence exists to establish a causal connection between the 13 April 2016 motor vehicle accident and [p]laintiff's alleged injury to his ears, including bilateral hearing loss." **https://appellate.nccourts.org/opinions/?c=2&pdf=38946**

Facts:

> "On 13 April 2016, plaintiff Travis Martin, an EMT worker, was driving an ambulance in Wake County along I-440 West when he was involved in a motor vehicle collision. Plaintiff was traveling between 40 and 45 mph when a vehicle [VW sedan] in a lane to the left of the ambulance turned to the right, colliding with the front left side of the ambulance. The collision caused one of the ambulance's wheel covers to fall off and the 'rub rail to bend.
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> Shortly after the collision, plaintiff's supervisor, Tammy Collie, traveled to the scene of the accident. Collie, who had spent twenty years as an ICU nurse and a flight nurse, questioned plaintiff about injuries he may have sustained. Plaintiff reported that his lower back and right knee were hurting, and he denied hitting his head or losing consciousness. Collie determined that plaintiff did not need an ambulance to transport him but recommended that plaintiff be evaluated at an emergency department. Collie noted that plaintiff engaged her in normal conversation, appeared to be able to hear and follow the conversation, and provided details about the collision consistent with other accounts of the accident. Another EMT worker transported plaintiff to WakeMedical Center (hereinafter 'WakeMed') Emergency Department.

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Medical care providers noted no trauma to plaintiff's head. Dr. Rosenbaum found moderate tenderness over the right paraspinal lumbar back and mild tenderness to the anterior right knee. X-rays of the lumbar spine revealed mild degenerative disc space narrowing at T12-L1 with no acute findings. X-rays of the right knee revealed tri-compartmental degenerative joint space narrowing and osteophyte formation with no acute findings. Later that day, plaintiff was discharged from WakeMed."

Holding:

"The record provides no indication that a loud noise occurred during plaintiff's motor vehicle collision. We uphold the Commission's findings of fact that 'there is no evidence [of]. . . 'a very loud noise' or a 'certain degree of noise' that would be sufficient to cause Plaintiff to sustain asymmetric bilateral hearing loss,' and "that it is not reasonable to infer that the collision in this case resulted in a noise level loud enough to cause Plaintiff's hearing loss.' Plaintiff's arguments challenging the Commission's findings of fact are overruled."

Legal Lessons Learned: With a minor MVA, it is difficult to understand the EMT's claim that he lost hearing in both ears.

Chap. 6: Employment Litigation

MD: WORKER'S COMP – GRANTED FOR ANKLE INJURY – AFTER SHIFT SPENT NIGHT AT STATION – AUTHORIZED

On April 7, 2020, in Montgomery County, Maryland v. John T. Maloney, the Court of Special Appeals of Maryland, held (3 to 0) that the FF, even though he was off duty, was entitled to workers comp, confirming the holdings of both the Workers Compensation Commission, and Circuit Court judge who held evidentiary hearing.

"In Maryland, employers must compensate 'covered employee[s]' for certain accidental personal injuries. Lab. & Empl. § 9-501. A compensable 'accidental personal injury' is one that 'arises out of and in the course of employment.' Lab. & Empl. § 9-101(b). At the end of the *de novo* evidentiary hearing, the circuit court concluded that Maloney's firehouse injury met these criteria—that it arose out of and in the course of his employment. The County's second appellate contention is that this conclusion by the circuit court was in error. To support its position, the County focuses mainly on the facts that Maloney was not on duty when he was injured, that he was not required to stay at Station 33 that night, and that he chose to stay there for his own convenience. These arguments are not persuasive."

Facts:

"The circuit court also heard testimony from Jeffrey Buddle, president of the local firefighters union. He provided additional context about the County's practice of allowing off-duty firefighters to sleep at stations before and between shifts (emphasis added):

'We also have firefighters that work for Montgomery County, they live just about everywhere, you name it. In a surrounding state, they live there, and I mean, New Jersey, Pennsylvania, Delaware, Virginia, West Virginia. A lot of times when a fire fighter is out here on whether it be overtime or a training class or whatever and then has to be somewhere in another work assignment the next morning, it is very common for our firefighters to stay at a fire station here in Montgomery County versus the long travel periods of time late at night.'

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Maloney is a career firefighter for Montgomery County, Maryland. At the time of trial, Maloney, a resident of Sterling, Virginia, was assigned to work at Fire Station 23 in Rockville. Maloney's typical work schedule required him to work twenty-four-hour shifts, starting and ending at 7 a.m. After each twenty-four-hour shift, he would have forty-eight hours off.

At the end of April 2016, the County hosted a two-day recruiting event at the Montgomery County Public Safety Training Academy, which is located near Gaithersburg, Maryland. The event was scheduled for Friday, April 29, and Saturday, April 30. Maloney was an instructor in the County's Candidate Physical Ability Test (CPAT) program for the recruitment of new firefighters and Battalion Chief Anthony Coleman was Maloney's supervisor in that regard. Coleman asked Maloney to volunteer to explain the CPAT to potential recruits at the event. Maloney agreed. Maloney would be paid overtime to work the event, which ran from 8 a.m. to 8:30 p.m. on Friday and from 6 a.m. to around 4 p.m. on Saturday.

That Friday, at the end of the first day of the recruitment event, Maloney left the academy at around 8:30 p.m. He went to a grocery store to pick up some food, and then, instead of driving home to Sterling, Virginia, Maloney went to nearby Fire Station 33, in Potomac, Maryland, to sleep for the night. Station 33 was not Maloney's regularly assigned station, and it was not the closest station to the academy. But, according to Maloney, it was 'a slower station' where he could get some rest. And staying over at fire stations before or between shifts, Maloney testified to the circuit court, was 'a normal customary practice' for County firefighters.

When he arrived at Station 33 at around 9 p.m., Maloney spoke with Captain Daniel Hudson, the station's commander. Hudson knew Maloney was staying overnight at the firehouse because he was supposed to work the recruitment event the following morning at the nearby academy. Maloney did not recall expressly asking the commander about staying at Station 33 that night, but no one told Maloney that he should not or could not do it.

Later that same night, Maloney cleaned up, took a shower, and did some reading. At around 10:30 p.m., Maloney walked into the engine bay. The lights were out, and when Maloney stepped down into the bay, he rolled his ankle. In accordance with procedure, Maloney later woke up Hudson to report his injury. Hudson filled out and filed a First Report of Injury, as required when an employee injures himself at work."

Holding:

"Our workers'-compensation scheme is designed to compensate 'only those injuries that are occupationally-related, and not those perils common to all mankind or to which the public is generally exposed.' *Montgomery County v. Wade*, 345 Md. 1, 9 (1997). For that reason, to fall within the scope of the Workers' Compensation Act, the accidental injury complained of must have arisen (1) *out of* and (2) *in the course of* employment. *Calvo v. Montgomery County*, 459 Md. 315, 327 (2018). These two conditions precedent are not synonymous. *Wade*, 345 Md. at 9. Both must be established by the 'facts and circumstances of each individual case.' *Schwan Food Co. v. Frederick*, 241 Md. App. 628, 649 (2019) (quoting *Livering v. Richardson's Restaurant*, 374 Md. 566, 574 (2003). However, we do not require that the conditions be satisfied with equal force and instead apply 'a rule of inverse relationships.' *Montgomery County v. Smith*, 144 Md. App. 548, 579 (2002). 'The stronger the facts are to show that an injury "arose out of employment" the more relaxed the requirement that the injury be shown to be 'in the course of employment' and vice versa.' *Id.*

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But the circuit court still could have reasonably concluded that the other circumstances surrounding Maloney's injury evinced an 'independently convincing association' between his presence at Station 33 at the

time of his injury and his employment. *Smith*, 144 Md. App. at 566 (quoting 4 Arthur Larson, *Workers' Compensation Law* § 22.03 (2001)).”

Legal Lessons Learned: Given the fact that off duty firefighters are routinely allowed to spend the night at a station, it is hard to understand why the County fought this claim.

Chap. 6, Employment Litigation

IL: VILLAGE RESIDENCY REQ. – FIRED – MARRIED CHICAGO TEACHER, PRIMARY RESIDENCE NOT MOTHER'S HOUSE

On March 31, 2020, in Anthony Figueroa v. The Board of Fire And Police Commissioners Of The Village of Melrose Park, Illinois, the Appellate Court of Illinois (First District) held (3 to 0) in unpublished decision, held that the trial judge in Circuit Court properly refused to overturn the Board's decision to terminate the firefighter's employment, even though he showed he had part-time residency in his mother's home in the Village. The room he used in his mother's house was also used by his mother.

> “Giving the statutory language its plain and ordinary meaning, the Village's residency requirement clearly and unambiguously provided that Figueroa had to live within the boundaries of the Village in a home that was his primary or most important residence throughout his period of employment. Contrary to Figueroa's argument on appeal, the record establishes that the Board did not erroneously construe the ordinance to mean that he could not have more than one residence.”

Facts:

> “Figueroa argues the evidence established that the Village was his principal residence because throughout his 14 years of employment as a Village firefighter he spent the overwhelming majority of his time residing in his mother's home in the Village despite his appearances in Chicago from time to time to be with his wife in her Chicago home.
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> The Village employed Figueroa as a firefighter/EMT from 2003 to 2017. In that position, he worked 24-hour shifts, with 24 hours on duty and then 48 hours off duty. When he applied for and initially obtained the position, he was living at his mother's house, a two-flat located on 23rd Avenue in the Village. In 2004, he purchased a duplex on 18th Avenue in the Village and lived there for about four years.
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> In 2008, he sold the duplex and moved into an apartment on Division Street in the Village. Figueroa terminated that apartment lease at about the time he got married in 2013. His wife was a Chicago Public School employee and was subject to a residency requirement to live in Chicago. Although his wife owned a home in Chicago and lived there since about 2001, Figueroa claimed that he moved back into his mother's Village home in 2013.
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> At the hearing in October 2017 before the Board, Figueroa testified that he was raised in the Village since the age of five and had lived there for almost his entire life. When he got married in 2013, he spoke to Chief Beltrame about Figueroa and his wife's different residency requirements. According to Figueroa, Chief Beltrame responded that Figueroa had to have his main or primary residence in the Village but did not have to live there exclusively.

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Figueroa testified that while his wife lived in her Chicago house with three family members, he moved back into his mother's Village house, where he lived with several family members but had his own room. He kept a number of personal items at his mother's house, including his clothing, toiletries, Xbox, sports equipment, and other items he used on a regular basis. He used the bed that was already at his mother's house but bought some furniture for her house and paid a portion of the mortgage every month. He had no rental agreement at his mother's house, and the room he used was also used by his mother."

Holding:

"The residency requirement of the Village's Municipal Code (Code) provided that:

'[e]ach and every officer and employee of the Village, unless exempted by this Chapter, must be a resident of the Village as that term has been defined herein. Each and every officer must maintain resident status during his term of office. Each and every employee must maintain resident status during his or her period of employment.' Village of Melrose Park, Ill., Municipal Code, ch. 2.52.020 (adopted 1997).

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A 'resident' is defined as 'a natural person who occupies a residence, as hereinbefore defined, as his or her principal place of residence and abode.' Id.

The evidence established that, after Figueroa's marriage in 2013, he terminated his rental agreement for his Village apartment and did not live in the Village as his principal residence. Specifically, he spent only one or two nights per week at his mother's Village home on nights before his fire shifts started. Although he kept a few personal items in a room at his mother's home, that room was not exclusively his. He had no written rental agreement concerning his use of his mother's home, and there was no evidence that he paid rent. Although he testified that he contributed to the mortgage payments on his mother's home, that testimony was not supported by any documents or other witness testimony. Furthermore, the documents Figueroa submitted merely showed that he used his mother's Village home as a mail drop. In contrast, he spent a significant amount of time living in a Chicago home with his wife and child. Figueroa was not separated or divorced from his wife, and he testified that he spent a lot of time with his family caring for his wife and their child. His wife, who was subject to a Chicago residency requirement as a Chicago Public School employee, owned the Chicago home and there was no evidence that she attempted to sell that property."

Legal Lessons Learned: If the FF had purchased a home, or leased an apartment in the Village, took all his mail there, and kept Fire Chief informed, there may have never been charges brought.

Note: Some states, including Ohio, have abolished local residency requirements for emergency responders. See Ohio Revised Code 9.481, "reside either in the county where the political subdivision is located or in any adjacent county in this state."

File: Chap. 7, Sexual Harassment [also file: Chap. 14]

AL: PREGNANT EMT – DENIED LIGHT DUTY – AMR CO. PROVIDES ONLY INJURED ON JOB - LAWSUIT REINSTATED

On April 17, 2020, in Kimberlie Michelle Durham v. Rural/Metro Corporation, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the U.S. District Court judge had improperly granted summary judgment to AMR.

"We therefore vacate the grant of summary judgment. Neither a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Since neither can meet the lifting requirement, they are the same in their 'inability to work' as an EMT. And that satisfies the plaintiff's prima facie requirement to establish that she was 'similar [to other employees] in their ability or inability to work.'"

Facts:

"Plaintiff-Appellant Kimberlie Durham's job as an emergency medical technician ('EMT') for Defendant-Appellee Rural/Metro Corporation ('Rural') required her to lift 100 pounds regularly. So when Durham's physician advised her to refrain from lifting more than 50 pounds while she was pregnant, Durham asked Rural for a temporary light-duty or dispatcher assignment for the duration of her pregnancy. Rural had provided these same accommodations to other EMTs who had suffered injuries on the job and were restricted to lifting no more than 10 or 20 pounds as a result. On the other hand, Rural had a policy of not granting such accommodations to employees who had been injured off the job. Rural also had a policy that allowed it to accommodate those with disabilities on a case-by-case basis.

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Rural provided private ambulance and fire-protection services in 21 states, including Alabama. Durham began working for Rural in St. Clair County, as an emergency medical technician ('EMT'), in the first week of March 2015. She regularly worked more than 40 hours per week.

Durham's duties, among others, included assisting her medic partner with anything he needed in patient care. That required Durham to help lift the stretcher, which itself weighed more than 100 pounds, and lift the patient to and from the stretcher. In addition, Durham had to move equipment between trucks and restock her truck's supplies. These duties demanded Durham physically lift things "[p]retty much all day long."

At the end of August 2015, Durham learned she was pregnant. At her next doctor's appointment, which occurred in September, Durham's doctor advised Durham not to lift more than 50 pounds during her pregnancy. So following that appointment, Durham told Mike Crowell, then the general manager for Rural's St. Clair operations, about her pregnancy and the lifting restriction.

In response, Crowell informed Durham that she would not be able to work on the truck. Durham agreed. So Durham asked to work either light duty or dispatch. Rural had a light-duty-type policy, called the Transitional Work Program ('Light-duty Policy'). Under that Policy, Rural would 'temporarily modify an employee's existing position and/or work schedule, or provide transitional assignments that [would] accommodate the temporary physical restrictions identified by the [employee's] treating physician.' By its terms, though, the Light-duty Policy applied to only those employees 'who suffer from a work-related injury/illness.' Rural's corporate representative testified in his deposition that he did not know the reason why only those with on-the-job injuries were eligible to take advantage of the Light-duty Policy. Nevertheless, he characterized the Policy as recognizing a 'difference between an elective condition . . . [and] an on-the-job injury.'

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Crowell told Durham what he learned from the Human Resources Office. He advised her that she could not work light duty, as only those on workers' compensation could take advantage of Rural's Light-duty Policy.

Crowell also stated that he had no dispatcher positions open. Rather, Crowell explained to Durham that she would have to take leave under Rural's Unpaid Personal Leave Policy.

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The district court granted Rural's motion and entered summary judgment for Rural. It did so after concluding that Durham had failed to establish a prima facie case of pregnancy discrimination because she had not shown that Rural treated Durham less favorably than others who were not pregnant but were similar to Durham in their ability or inability to work. It thus granted Rural's motion and entered summary judgment for Rural. Durham now appeals."

Holding:

"The Pregnancy Discrimination Act commands that pregnant women "be treated the same . . . as other persons not so affected but similar in their ability or inability to work[.]" 42 U.S.C. § 2000e. Five years ago, in Young v. United Parcel Service, 575 U.S. 206 (2015), the Supreme Court addressed anew the doctrine courts are to use to assess indirect evidence of intentional discrimination in violation of the PDA. This case presents a question of first impression as to how to implement the *Young* test.

***

Here, as in *Young*, Durham's temporary inability to lift more than 50 pounds and her colleagues' inabilities to lift more than 10 or 20 pounds rendered Durham, and her colleagues injured on the job, equally unable to perform the 100-pound lifting duties of an EMT. Thus, Durham and her colleagues who were injured on the job were 'similar in their ability or inability to work.'

***

Because Durham has established a prima facie case, we must turn to Rural's ostensible 'legitimate, non-discriminatory' reasons for refusing to offer Durham light duty or a dispatcher position. Here, Rural offered two: Rural's Light-duty Policy applies to only those injured on the job, and Rural had no dispatcher positions available at the time Durham sought accommodation.

Therefore, to survive summary judgment, Durham must point to enough evidence to create a material issue of fact that Rural's stated reasons for denying accommodation are pretextual.

***

But because the district court determined that Durham did not make a prima-facie-case showing, it did not have occasion to separately evaluate Rural's purported legitimate, non-discriminatory reasons for denying Durham her requested accommodation. Nor did it consider whether Durham had pointed to sufficient evidence to raise a genuine issue of fact concerning whether Rural's stated reasons for treating Durham differently than other EMTs with lifting restrictions were pretextual. We therefore remand to the district court to make these assessments in the first instance."

Legal Lessons Learned: Congress in enacting the Pregnancy Discrimination Act did not specifically address the issue of light-duty; hopefully the U.S. Supreme Court will ultimately give clear direction on this issue.

Note: UPS changed their light-duty policy while their case was pending before Supreme Court [where they lost]. See Oct. 29, 2014 article, "With Supreme Court case pending, UPS reverses policy on pregnant workers." The change of policy, UPS attorneys argue in the brief, doesn't mean they were wrong when they denied temporary light duty to one-time UPS driver Peggy Young, of Landover, Md., when she became pregnant and her doctor recommended she take a hiatus from lifting heavy boxes until after giving birth.

In the March 25, 2015 decision in Young v. UPS, the Supreme Court (6 to 3) overturned the summary judgment that UPS had won at U.S. District Court, and also won in the Court of Appeals.

File: Chap. 7, Sexual Harassment

FL: FEMALE FF RESIGNS, 20 YRS ON FD – CLAIMS HOSTILE WORK ATMOSPHERE, FEW SPECIFICS – CASE DISMISSED

On April 1, 2020, in Colleen Moore v. San Carlos Park Fire Protection & Rescue, the U.S. Court of Appeals for the 11th District (Atlanta) held (3 to 0) in unpublished opinion that the trial court properly granted the FD's motion to dismiss. Moore resigned on November 5, 2013, after more than 20 years of service.

> "While the complaint lists a series of discrete acts, it does not provide the dates of those acts or mention the supervisor responsible for any alleged acts. Similarly, her EEOC charge alleges Moore was harassed, called 'the girl,' and disciplined more severely than men, but does not provide any details supporting those allegations. Without connecting names or dates to each incident, we cannot determine who committed the acts or when they were committed. See Morgan, 536 U.S. at 120. Thus, Moore has not established that the three timely adverse acts are sufficiently related to any of the other complained of acts, such that they support the same hostile work environment claim.

Facts:

> "Although this litigation commenced in October of 2017, the facts giving rise to Moore's claims date back to as early as 1991, when Moore began volunteering as a firefighter for San Carlos Park. Moore claims that throughout her employment at San Carlos Park—beginning when she joined as a volunteer in 1991 and continuing during her employment as a full-time firefighter from 1993 through 2013—she 'was subjected to repeated and pervasive comments and behavior because of her sex by agents of [San Carlos Park], who at all relevant times had the authority or apparent authority to hire, promote, discipline and/or fire employees.
>
> ***
>
> Following her resignation, on February 27, 2014, Moore filed a charge of discrimination with the EEOC, alleging discrimination based on gender and retaliation in violation of Title VII of the Civil Rights Act of 1964 ('EEOC charge'). Moore submitted the following statement in her EEOC charge:
>
> > 'I am a Female. I was employed by the Respondent for 20 years. I was subjected to a hostile work environment fduring [sic] my entire employment because of my gender. I was harassed, called 'the girl' and disciplined for incidents that other male employees are not disciplined for. On or about February 2010, I was demoted because I did not send a male Driver Engineer to take a drug test. I filed a grievance and won my rank back in 2011 with complete back pay. During my demotion I took the Lieutenant and the Battalion Chief test and when I was made whole I became the Battalion Chief. On or about August 2013, Gene Rison was selected as Assistant Chief. Since that time, I have been suspended for two days without pay, disciplined and written up and forced to resign from my position. I was forced to resign because I was demoted from Battalion Chief down 2 ranks and 9 steps to Firefighter 4. I was told by Gene Rison that I was being demoted due to neglect of duty and my probationary status.
> >
> > I believe that I have been discriminated against because of my gender and retaliated against in violation of Title VII of the Civil Rights Act of 1964, as amended.'
>
> In its response to Moore's charge, the EEOC indicated that it was unable to conclude that the information Moore had provided established a violation of the relevant statutes."

Holding:

> "Accordingly, the timely adverse acts in the complaint and EEOC charge [those that occurred within 300 days of her resignation], considered along with Moore's untimely allegations, do not allow Moore to proceed with a hostile work environment claim."

Legal Lessons Learned: Fire & EMS departments should have Employee Handbooks requiring employees to promptly file complaints in writing.

File: Chap. 8, Race Discrimination

NY: FDNY – FF NOT PROMOTED (2015) – ALLEGED RETALIATION FOR EEOC CHARGE (2012) – DISMISSED

On April 17, 2020, in George Ful Ninying v. New York City Fire Department, the U.S. Court of Appeals for the Second Circuit (New York City), held (3 to 0) in a Summary Order that the U.S. District Court judge had properly granted summary judgment to the City. Plaintiff filed suit *pro se* (represented himself without an attorney in both trial court and on appeal). Court of Appeals agreed with District Court judge, that plaintiff failed to allege facts to show that he would have been promoted in 2015, "but for" his having filed an EEOC complaint in 2012, and there was alleged facts support his claim of race discrimination because his wife is African-American and he is "Black Minority."

> "In order to plead a prima facie claim of retaliation under both Title VII and the ADEA, a plaintiff must allege that (1) he participated in a protected activity; (2) the employer knew of his protected activity; (3) he was subjected to an adverse employment action; and (4) there was a causal connection between the participation in the protected activity and the adverse employment action…. Here, too, Ninying's conclusory allegation fails to state a retaliation claim under either the ADEA or Title VII, both of which required him to allege that his protected activity was the but-for cause of the adverse employment action. See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 US. 338, 360, 362–63 (2013) (holding that unlike other Title VII claims, Title VII retaliation claims must be proved according to 'traditional principles' of but-for causation). Nor did Ninying's allegation that he was retaliated against in 2015 for filing a 2012 EEOC complaint allege the requisite causation."

Facts:

> "The only details concerning this retaliation claim can be found in the EEOC Intake Questionnaire attached to his amended complaint. He alleged that he was denied a promotion in November 2015 based upon his filing a previous EEOC complaint: the number he ascribed to that complaint indicates that it was filed in 2012."

Holding:

> "To avoid dismissal, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.' Bell Atl. Corp. v.Twombly, 550 U.S. 544,570 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.
>
> ***
>
> Second, the district court correctly ruled that Ninying failed to state a claim under the ADEA. 'A prima facie case of age discrimination requires that plaintiffs demonstrate membership in a protected class, qualification for their position, an adverse employment action, and circumstances that support an inference of age

discrimination.' Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 238 (2d Cir. 2007). The ADEA requires a plaintiff to assert that his age is the 'but-for' cause of the alleged adverse employment action. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009). While Ninying asserted that he was passed over for a promotion because of his age, he did not allege any facts to show that age discrimination was the but-for cause of the FDNY's failure to promote him.

***

Ninying asserts that he was discriminated against because his wife is African American and he is a 'Black Minority,' but he does not allege any facts relating his protected status to his failure to be promoted…. And though Ninying alleges that he is fluent in French because of his national origin, he has neither identified his national origin nor alleged that he faced discrimination because of it.

***

Moreover, Title VII does not provide a cause of action based on marital status or the protected status of one's spouse. See, e.g., 42 U.S.C. § 2000e-2(a)(1); Ford v. Bernard Fineson Dev. Ctr., 81 F.3d 304, 310 n.9 (2d Cir. 1996)."

Legal Lessons Learned: Plaintiff also alleged race discrimination based on his wife's race, and that he is a "Black Minority."

Note: Court wrote: "Ninying asserts that he was discriminated against because his wife is African American and he is a 'Black Minority,' but he does not allege any facts relating his protected status to his failure to be promoted…. And though Ninying alleges that he is fluent in French because of his national origin, he has neither identified his national origin nor alleged that he faced discrimination because of it."

File: Chap. 9, Americans With Disabilities Act [also file: Chap. 10; and Chap. 15]

PA: FF PANIC ATTACK ON DUTY – PTSD, MEDICATION – NO LONGER QUALIFIED AS FF – TERMINATION NOT VIOL. ADA

On April 17, 2020, in Robert Carpenter v. York Area United Fire And Rescue, U.S. District Court Judge Christopher C. Conner, Chief Judge, Middle District of Pennsylvania, granted the FD's motion for summary judgment. The Court held that the firefighter was not a "qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation," and indefinite leave of absence was not a reasonable accommodation; "there must be some expectation that the employee could perform his essential job functions in the 'near future' following the requested leave.

"[Fire Department] argues that Carpenter is not a qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation. We agree."

Facts:

"On September 21, 2017, Carpenter was working a 24-hour shift when he awoke at 1:30 a.m. and began to experience a severe panic attack…. He was eventually able to fall back to sleep and finish his shift ending at 8:00 a.m…. Later the same day, he visited his primary care physician, who provided a note stating that Carpenter would be 'out of work indefinitely' but omitting any diagnosis, prognosis, or estimated date of return….. Over the course of the following six months, the parties exchanged a series of communications regarding Carpenter's medical condition and continuing absence from work. [Terminated March 23, 2018.]

***

Carpenter has been a firefighter in York County since 1997—first with Springettsbury Township and then with YAUFR…. Upon YAUFR's formation in 2007, Carpenter became an employee of, and received his paychecks from, this newly combined entity…. He was also a member of the Local 2377 International Association of Firefighters, which had a collective bargaining agreement with YAUFR…. Carpenter's professional duties included fire prevention and education, responding to emergency incidents and health-related emergencies, cleaning the firehouse, and studying….

***

Carpenter testified [deposition] … he began a series of medications including Venlafaxine…. According to Carpenter [deposition], in addition to depression, he was also diagnosed with acute, stress-induced anxiety and post-traumatic stress disorder ('PTSD'). Carpenter also testified that he experienced involuntary, stress-induced 'flailing,' for which he was prescribed Primidone…. Following termination from YAUFR [the FD], his depression worsened and resulted in several involuntary hospitalizations as well as treatment with electroconvulsive therapy.

***

On December 7, Carpenter's primary care physician provided a brief note to YAUFR indicating that Carpenter had been seen on November 29, had another appointment scheduled for December 20, "needs to remain out of work until his next appointment," and "is unable to work at this time in any capacity."… Carpenter did not appear for the December 11 disciplinary hearing…. On January 2, 2018, the same physician sent a nearly identical letter to YAUFR (altering only the appointment dates), indicating that Carpenter needed to remain off work until at least January 10 and was unable to work 'in any capacity.'

***

The parties stipulate that Carpenter's job duties included fire prevention, fire education, emergency response, cleaning the firehouse, and studying. Carpenter concedes, as he must, that during the time in question—September 21, 2017, to the end of March 2018—he could not perform these job functions without reasonable accommodation. Carpenter's medical excuses plainly state that he could not work in any capacity, and Carpenter never returned to work following his September 21, 2017 panic attack and eventual termination from YAUFR. Indeed, Carpenter applied for, and received, federal Supplemental Security Income benefits due to his significant and prolonged mental-health impairment….

***

YAUFR held the March 12 disciplinary hearing as scheduled despite Carpenter's absence…. Ten days later, YAUFR sent Carpenter a detailed letter outlining seven alleged instances of insubordination, repeated failure to provide requested medical information and adequate medical excuses for scheduled meetings and hearings, and other various instances of failing to perform as ordered…. The March 22 correspondence ultimately informed Carpenter that, effective March 23, 2018, his employment with YAUFR was officially terminated."

Holding:

"Carpenter contends that he required extended medical leave to recover and that such leave would be a reasonable accommodation…. Assuming Carpenter adequately communicated this proposed accommodation to YAUFR, he is incorrect that such an accommodation is reasonable.

It is true that, in certain circumstances, a leave of absence may be a reasonable accommodation under the ADA. See Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 151 (3d Cir. 2004). However, that leave cannot be indefinite or open-ended; there must be some expectation that the employee could perform his essential job functions in the 'near future' following the requested leave."

Legal Lessons Learned: FF on leave and undergoing treatment, who desires to get back to the job, needs to stay in communication with FD. FMLA also addressed (see below).

> Note: Court also held that the FF was not entitle the FMLA leave. "In a letter dated October 11, 2017, YAUFR denied Carpenter's FMLA leave request…. YAUFR explained that, although it was a covered employer under the FMLA, it did not employ the requisite number of people for Carpenter to be considered an 'eligible employee' under FMLA regulations. *** To qualify as an 'eligible employee,' the employee must be 'employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.' 29 C.F.R. § 825.110(a)(3); see 29 U.S.C. § 2611(2)(B)(ii). YAUFR avers, and Carpenter concedes, that YAUFR has never employed 50 or more people."

File: Chap. 13, EMS

NM: CORONA VIRUS – MEGA CHURCH CHALLENGED LIMIT OF 5 PEOPLE – DENIED TEMPORARY RESTRAINING ORDER

On April 17, 2020, in Legacy Church, Inc. v. Kathyleen M. Kunkel and State of New Mexico, U.S. District Court Judge James O/ Browning denied the church's motion for temporary restraining order. Legacy Church has nearly 20,000 members, with church services held in four locations in Albuquerque. Kathyleen M. Kunkel is New Mexico's Secretary of Health Department; on March 24, 2020, Secretary Kunkel issued the Public Health Order, which ordered all non-essential businesses to close, ordered all of the state's non-essential workforce to work from home, and ordered New Mexico citizens to 'stay at home and undertake only those outings absolutely necessary for their health, safety, or welfare.'

> "The Court denies the Motion. The Court concludes, first, that the Eleventh Amendment prohibits Legacy Church's suit insofar as it seeks relief against the state of New Mexico. Second, the Court concludes that Legacy Church is not substantially likely to succeed on the merits of its Free Exercise claim. Specifically, the April 11 Order is both neutral and generally applicable, and there is no evidence of animus against Christianity in particular or against religion in general. Accordingly, the April 11 Order is subject to rational basis review, which it satisfies. Third, the Court concludes that Legacy Church is not likely to succeed on its assembly claim, because the April 11 Order not only is narrowly tailored with sufficient alternatives for Legacy Church to assemble and mitigating a state pandemic is a compelling interest. Fourth, the Court concludes that Legacy Church has not demonstrated that it will suffer irreparable harm in a TRO's absence, it has not demonstrated that the equities weigh in a TRO's favor, and it has not demonstrated that a TRO is in the public interest. Accordingly, the Court denies the TRO. … Footnote 16: The Court does not want its Memorandum Opinion to be read to minimize the importance of faith in people's lives. Certainly religion is the centerpiece of many people's lives, and many individuals may feel as if religion saved their life. But essential services focus on the public as a whole -- essential businesses are essential for the lives of everyone, because they are necessary to ensure public health and welfare."

Legal Lessons Learned: Public health and welfare prevails over a church's desire to hold large gatherings.

Note: See this April 26, 2020 article, "Breaking: Church, Louisville, KY Mayor Reach Agreement in Dispute Over Drive-in Church Services."

File: Chap. 13, EMS

NJ: RETALIATION - EMS SUPERVISOR FIRED – WOULD NOT GIVE FALSE INFO ON EMT SUING HOSP. FOR SEX HAR.

On April 14, 2020, in Emiliano Rio v. Meadowlands Hospital Medical Center, the Superior Court of New Jersey, Appellative Division, held (3 to 0) that the trial court judge improperly granted the hospital's motion for summary judgement; the for EMS Supervisor's retaliation lawsuit may now proceed to trial.

> "Based on our review of the record, we are convinced the motion court erred in its determination plaintiff did not present sufficient evidence establishing the good faith and reasonable basis prerequisite for a LAD retaliatory discharge claim established by our Supreme Court in Carmona v. Resorts International Hotel, Inc., 189 N.J. 354, 372 (2007), and we reverse and remand for further proceedings….The facts proffered by plaintiff, which we accept as true for our analysis of the court's disposition of the summary judgment motion, show defendant attempted to retaliate against Bailey for the filing of her LAD complaint. Following the filing of [Ms.] Bailey's [sexual harassment] complaint, defendant requested plaintiff file a baseless complaint for a restraining order against Bailey; conjure up false complaints about Bailey; and make false statements about her. Those requests constitute an attempt by defendant to commit 'an unlawful employment practice' in violation of N.J.S.A. 10:5-12(d)—retaliation against Bailey for her filing of a sexual harassment complaint."

Facts:

> "In November 2013, defendant terminated plaintiff's co-employee and friend Heatherlee Bailey from her employment in EMS. In April 2014, Bailey filed a sexual harassment complaint against defendant and several others.
>
> ***
>
> After service of Bailey's complaint on defendant, Rostik Rusev, the Coordinator of EMS, 'repeatedly told' plaintiff 'he needed to be a team player and [d]efendant needed his support against the Bailey lawsuit.'
>
> ***
>
> Plaintiff asserted that at various times he told Rusev he was not comfortable with Rusev's instructions to make the requested statements concerning Bailey or to obtain the requested complaints; the statements Rusev asked he make about Bailey were not true; and he objected to Rusev's request that he fill the role Rusev wanted him to play in defending against Bailey's complaint. Plaintiff claims that following his objections to Rusev's requests and his refusals to accede to the requests, defendant retaliated by removing some of his job responsibilities as EMS supervisor and by later terminating his employment."

Holding:

> "If plaintiff had acceded to the requests, Bailey would have been compelled to respond to a baseless complaint seeking a restraining order against her, forced to fend off false complaints, and required to confront false allegations made by plaintiff solely as a result of requests made by defendant in response to, and in retaliation for, Bailey's filing of her LAD lawsuit. Defendant's alleged requests to plaintiff constitute a paradigm of retaliatory conduct the LAD expressly prohibits. Plaintiff's opposition to defendant's requests, effectuated through his refusal to take the actions and make the statements defendant requested, prevented defendant from retaliating against Bailey.
>
> ***
>
> Having reviewed the summary judgment record, we are satisfied plaintiff sustained that burden by presenting evidence he refused defendant's requests that he seek a meritless restraining order against Bailey and make misrepresentations concerning her. Giving plaintiff the benefit of all favorable inferences, plaintiff

demonstrated he had a good faith and reasonable belief defendant's requests constituted efforts by defendant to unlawfully retaliate against Bailey for the filing of her discrimination and harassment complaint."

Legal Lessons Learned: Employers sued for sexual harassment must be extremely careful in discussions with employees about their dealings with the plaintiff. It is often best to leave this to legal counsel.

File: Chap. 13, EMS

PA: CORONA VIRUS – POL. CANDIDATE, REAL ESTATE AGENT, GOLF COURSE SHUT DOWN - TRO DENIED

On April 13, 2020, in Friends of Danny Devito, et al. v. Tom Wolf, Governor, Supreme Court of Pennsylvania, Middle District, the Court held (4 to 3), that Governor lawfully declared an Emergency, and he could shut down their businesses: Candidate for PA House of Representatives; real estate agent; public golf course and restaurant.

> "Petitioners are four Pennsylvania businesses and one individual seeking extraordinary relief from Governor Wolf's March 19, 2020 order (the 'Executive Order') compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease ('COVID-19').The businesses of the Petitioners were classified as non-life-sustaining…. Petitioners suggest that the public interest would best be served by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.

Legal Lessons Learned: Governor has broad emergency powers under State statutes.
Note: See newspaper article on the decision: "Split Pa. Supreme Court rejects latest challenge to Gov. Wolf's coronavirus business shutdown order."

File: Chap. 13, EMS

KS: CORONA VIRUS – STATE LEGISLATIVE COMMITTEE CAN'T OVERRULE GOVERNOR'S LIMITS 10 PEOPLE

On April 11, 2020, in Governor Laura Kelly v. Legislative Coordinating Council, Kansas House of Representatives, and Kansas Senate, the Kansas Supreme Court held (7 to 0) that the Legislative Council cannot revoke an Executive Order of the Governor. On April 8, the LCC convened pursuant to HCR5025. By 5-to-2vote, it revoked Executive Order 20-18.

> "On April 7, Governor Kelly used her K.S.A. 2019 Supp. 48-925(b) powers to issue Executive Order 20-18, relating to her March 12 emergency proclamation. Among other things, it temporarily prohibited, subject to several exemptions, 'mass gatherings,' defined as 'any planned or spontaneous, public or private event[s] or convening[s] that will bring together or [are] likely to bring together more than 10 people in a confined or enclosed space at the same time.' Executive Order 20-18 rescinded and replaced an earlier, substantially similar executive order. But Executive Order 20-18 differed in that it removed '[r]eligious gatherings' and

'[f]unreal or memorial services or ceremonies' from the list of 'activities or facilities' exempt from the temporary prohibition of mass gatherings…. The Court has considered and grants in part the Governor's Petition in Quo Warranto. The LCC's purported revocation of Executive Order20-18 on April 8 was a nullity, because the LCC lacked authority do so under HCR5025's terms."

Legal Lessons Learned: A Legislative Committee does not have power to overturn Governor.

Note: See the April 12, 2020 article about this decision: **"**Kansas Supreme Court Upholds Governor's Order Limiting The Size Of Easter Services."

File: Chap. 13, EMS

TX: EMS CHECKED OUT OVERDOSE PATIENT AT SCENE – HIT HIS HEAD 40+ POLICE CRUISER GOING JAIL – DIED - EMS IMMUNITY, NOT PD

On April 9, 2020, in Kathy Dyer & Robert Dyer v. Richard Houston, et al., the U.S. Court of Appeals for the 5th Circuit (New Orleans), held (3 to 0) that the U.S. District Court judge properly granted the paramedics' motion to dismiss on the basis of qualified immunity; there was no proof of "deliberate indifference." Court, however, reinstated the lawsuit against the police officers since patient hit his head over 40 times in back of police cruiser.

"We agree with the district court that the Dyers' complaint fails to allege facts that plausibly show the Paramedics' deliberate indifference. The thrust of the complaint is that, after examining Graham [Dyer] and observing his head injury and drug-induced behavior, the Paramedics should have provided additional care—such as sending Graham to the hospital, accompanying him to jail, providing 'further assessment or monitoring,' or sedating him. At most, these are allegations that the Paramedics acted with negligence in not taking further steps to treat Graham after examining him. Our cases have consistently recognized, however, that 'deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm.'"

Facts:

"Plaintiffs Kathy and Robert Dyer ('the Dyers') appeal the dismissal on qualified immunity grounds of their deliberate- indifference claims against paramedics and police officers employed by the City of Mesquite, Texas. The Dyers' claims arise out of the death of their 18-year-old son, Graham, from self-inflicted head trauma while in police custody.

***

Graham died after violently bashing his head over 40 times against the interior of a patrol car while being transported to jail.

***

According to the complaint, [Paramedics] Polish and Baker arrived on the scene in the late evening hours of August 13, 2013. There they found Graham already detained by police officers for exhibiting erratic behavior. After 'learning that [Graham and his friend] had consumed LSD,' one 'paramedic went over to examine Graham.' He summoned the second paramedic, after which they both 'further examine[d] Graham.' Graham 'had sustained a visible and serious head injury.' Moreover, the Paramedics 'were aware that [Graham] had ingested LSD and was incoherent and screaming,' and 'were aware that he was not rational and was in a drug induced psychosis.' '[B]oth examined [Graham], including his serious head injury.' According to video evidence referenced by the complaint, after the Paramedics 'were finished looking at Graham,' he was 'walked to the police car without resistance or struggle.' Graham was then driven to jail. The complaint contains no further allegations about the Paramedics.

***

They claim Polish and Baker 'made no recommendations for further treatment or medical intervention, including sedation which would have calmed Graham down and allowed him to comply with instructions.'

They further claim 'Polish and Baker also knew of the substantial risk of serious harm that would result from ignoring the psychosis of someone who had ingested LSD, yet they did nothing to treat Graham [or] transport him for treatment.' Finally, they claim 'Graham should have been given a sedative and transported to the emergency room' because the Paramedics 'were aware of facts demonstrating a substantial risk of serious harm and disregarded the risk by failing to take reasonable measures to treat Graham.'

***

Graham was then placed in Heidelburg's patrol car. While officers were trying to secure Graham, he bit Fyall on the finger. Graham was placed in leg restraints, but his seatbelt was not fastened. Heidelburg then drove off with Graham. Scott and Gafford followed in their own patrol cars. While Heidelburg was driving, Graham screamed, thrashed violently, and slammed his head multiple times against the interior of the car. Heidelburg told Graham to stop hitting his head, but Graham did not comply. Heidelburg testified he pulled the car over to '[t]ry to stop [Graham] from hitting his head on the cage.' Scottsaw Heidelburg pull the car over and assumed he was doing so because Graham 'was banging his head.' The internal investigation report prepared by the Mesquite Police Department (based in part on a video recording of the incident) reported that Graham slammed his head against the 'metal cage, side window and back seat' 19 times before Heidelburg pulled over.

At that point, Scott stopped to help 'prevent [Graham] from banging his head on the back of the car.' Gafford also pulled over, seeking to help stop Graham from doing 'further harm to himself.' Gafford testified he could 'actually see the car shaking from side to side' as Graham flung himself around in the back seat. When the car stopped, Graham continued to 'scream and thrash,' and the Officers tased him several times to regain control. After re-securing Graham, Heidelburg resumed driving toward the jail and Graham continued to scream and slam his head against the car's interior. According to the investigation report, Graham bashed his head another 27 times before they arrived at jail.

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Just over two hours later, the sergeant noticed Graham's breathing was labored and summoned paramedics, who arrived at 1:40 a.m. Graham was transported to a local hospital and died at 11:00 p.m. that evening. Among other injuries, the autopsy reported extensive blunt force injuries to Graham's head and cranial hemorrhaging. The reported cause of death was craniocerebral trauma."

Holding:

"We first address whether the district court properly granted the Paramedics' motion to dismiss based on qualified immunity. The court relied on the first prong, finding the amended complaint failed to state a plausible deliberate - indifference claim against the Paramedics. Specifically, the court found insufficient the allegations that, because the Paramedics observed Graham's 'serious head injury' and 'LSD-induced behavior,' they should have provided additional care.

***

To succeed on a deliberate-indifference claim, plaintiffs must show that (1) the official was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' and (2) the official actually drew that inference. Domino v. Tex. Dep't of Criminal Justice, 239 F.3d 752, 755 (5th Cir. 2001) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). 'Deliberate indifference is an extremely high standard to meet.' Id. at 756.

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We note that some of our cases have posited a third element—that the official 'subjectively intended that harm occur.' SeeGarza v. City of Donna, 922 F.3d 626, 635 & n.5 (5th Cir. 2019) (citing, inter alia, Tamez v. Manthey, 589 F.3d 764, 770 (5th Cir. 2009)). A panel of our court, however, recently wrote that it 'cannot endorse [this] analysis' because it 'depart[s] from controlling Supreme Court and Fifth Circuit law.' Garza, 922 F.3d at 636 (collecting decisions). In this case, the district court invoked this additional "subjective intent" element, but that does not affect our disposition of the motion to dismiss. As we explain, the allegations against the Paramedics would fail under the established two-part standard. See id.at 635 (two-part test more consonant with 'the weight of our case law and . . . the Supreme Court precedent from which our cases flow'); id.at 636 & n.6 (collecting decisions).

***

We agree with the district court that the Dyers' complaint fails to allege facts that plausibly show the Paramedics' deliberate indifference. The thrust of the complaint is that, after examining Graham and observing his head injury and drug-induced behavior, the Paramedics should have provided additional care—such as sending Graham to the hospital, accompanying him to jail, providing 'further assessment or monitoring,' or sedating him. At most, these are allegations that the Paramedics acted with negligence in not taking further steps to treat Graham after examining him. Our cases have consistently recognized, however, that 'deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm."' Thompson, 245 F.3d at 458–59 (citing Hare, 74 F.3d at 645); see also, e.g., Delaughter v. Woodall, 909 F.3d 130, 136 (5th Cir. 2018) (clarifying that 'mere disagreement with one's medical treatment is insufficient to show deliberate indifference'); Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006) (explaining that '[u]nsuccessful medical treatment, acts of negligence, or medical malpractice do not constitute deliberate indifference") (citations omitted).

***

Measured against these standards, we cannot say the complaint plausibly states a deliberate - indifference claim against the Paramedics. We therefore affirm the district court's dismissal of those claims."

Legal Lessons Learned: Qualified immunity is an important legal protection for emergency responders, but it is not "absolute" immunity.

Note: Lawsuit against police officers will proceed. Court wrote: "By contrast, in this case a reasonable jury could find that (1) Graham violently bashed his head against the interior of Officer Heidelburg's patrol car over 40 times while en route to jail; (2) Officers Heidelburg, Gafford, and Scott were fully aware of Graham's actions and of their serious danger; (3) the Officers sought no medical attention for Graham; and (4) upon arriving at jail, the Officers failed to inform jail officials what Graham had done to himself, telling them only that Graham had been 'medically cleared' at the scene. From this evidence, a reasonable jury could conclude that the Officers 'were either aware or should have been aware, because it was so obvious, of an unjustifiably high risk to [Graham's] health,' did nothing to seek medical attention, and even misstated the severity of Graham's condition to those who could have sought help."

File: Chap. 13, EMS

CA: CORONA VIRUS – LOS ANGELES MAYOR SHUTS DOWN GUN SHOPS – GOVERNOR / SHERIFF HAD NOT - TRO DENIED

On April 6, 2020, in Adam Brandy v. Alex Villanueva, et al., U.S. District Court Judge Andrew Birotte, Jr. held that Los Angeles Mayor Eric Garcetti has the power to shut down gun stores as non-essential businesses in the city. The Governor on March 19, 2020 had issued an order that left the decision on gun shops to County Sheriffs. On March 24, 2020, Sheriff Villanueva of LA County ordered all gun shops closed, but he later changed his opinion and declared them an essential business. Federal judge denied gun shop owners' motion for a Temporary Restraining Order.

> "Moreover, because this disease spreads '[a]n affects person coughs, sneezes or otherwise expels aerosolized droplets containing the virus,'… the closure on non-essential businesses, including firearms and ammunition retailers, reasonably fits the City's and County's stated objective of reducing the spread of this disease. Plaintiffs fail to demonstrate a likelihood of success on the merits of the Second Amendment claim against the County and City orders."

Legal Lessons Learned: TRO denied since Mayor's orders are based on emergency.

> Note: See April 14, 2020 article on LA Superior Court judge's decision, forcing gun stores to remain closed, "Coronavirus: Judge upholds LA city order to close gun stores,"

File: Chap. 15: CISM

MA: ANGER MGT, THREATS TO "GO POSTAL" – PAID LEAVE 1-YR - DIDN'T COMPLY RETURN-TO-WORK REQUIREMENTS - FIRED

On April 2, 2020, in Gerald Alston v. Town of Brookline, Massachusetts, Senior U.S. District Court Judge George A. O'Toole, Jr., District of Massachusetts, granted summary judgment for the Town, finding that he failed to meet the Fire Chiefs return to work requirements, including completing an anger management course, and passing a fitness for duty evaluation, and drug test.

> "Alston was evaluated both by a psychiatrist chosen by the Town and, after his request for evaluation by a different doctor, an evaluation by a psychiatrist from the Massachusetts General Hospital was arranged. Both psychiatrists recommended essentially the same return-to-work conditions for Alston, and it is undisputed that Alston never complied with those conditions. Nor did he provide any conflicting opinion from another psychiatrist."

Facts:

> "Alston returned to work in late January 2011. Workplace tension may have eased for a while for Alston, but on December 19, 2013, he noticed that someone had written the word 'Leave' in accumulated dust on the side of one of the fire trucks in the station. He understood that to have been directed at him, and he reacted angrily. He showed it to two other firefighters and made some remarks about shooting people and 'going postal' that could reasonably have been understood as threats of violent reaction. threatened
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> ***
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> Alston is an African American. He was employed by the Town as a firefighter beginning in 2002. In 2010 a white superior officer in the fire department left a message on Alston's telephone that referred to him using an ugly racial epithet. Alston was greatly upset by that message and demanded that the Town take disciplinary action against the employee who left the message. The Town suspended the offender for a brief period, but

Alston was not satisfied. It is this incident, and Alston's vigorous disagreement with it, that hangs over this entire controversy. In 2013 Alston brought suit against the Town in the Massachusetts Superior Court alleging racial discrimination and retaliation under the State's anti-discrimination statute, Massachusetts General Laws Chapter 151B, Section 4. The complaint summarized his grievance this way: "In short, complaining about being called a 'f***ing n****r' by a white superior has resulted in the [fire] [d]epartment, down to nearly every last officer, joining together to make life as miserable as possible for Mr. Alston." … The case was eventually dismissed with prejudice in July 2014 as a sanction for Alston's failure to comply with discovery obligations.

***

On November 24, 2010, he became so emotionally agitated at his fire station that EMTs took him, apparently with his consent, to the emergency department at the Beth Israel Deaconess Medical Center for evaluation. He was deemed after examination by attending psychiatrists to be fit for discharge home, but it was recommended that he not immediately return to work. He attended outpatient counseling with a clinical social worker to deal with his persistent feelings of anger at how he perceived he had been treated by the Brookline fire department. As a result of the November 24 episode, Alston began an outpatient treating relationship with a psychiatrist, Dr. Michael Kahn.

***

On May 14, 2014, fire department Chief Paul Ford wrote to Alston outlining the conditions suggested by Dr. Brown to be satisfied before Alston would be deemed fit for duty: (1) receiving ongoing psychiatric treatment, (2) permitting Brookline's occupational health nurse to monitor treatment progress, (3) completing an anger management course, (4) passing a fitness for duty evaluation, and (5) submitting to random drug testing for twenty-four months….

***

A second fitness for duty evaluation by Dr. Brown was scheduled in the fall of 2014, but Alston's lawyer objected to examination by Dr. Brown. At the lawyer's request, the Town arranged for Alston to be evaluated by a psychiatrist not affiliated with the Town. In February 2015, Dr. Marilyn Price, a psychiatrist practicing at the Massachusetts General Hospital, interviewed Alston and submitted a detailed written assessment in mid-March. Dr. Price concluded that Alston should be returned to duty only if there could be 'workplace accommodations' that would relieve the stress he had felt about what he perceived as unfair treatment by department personnel. Her suggested conditions were similar to Dr. Brown's.

***

Time went by with no progress in getting Alston back to work. In a letter to Alston's attorney dated February 5, 2016, Brookline's Town Counsel noted that Alston had been on paid leave for almost a year, an arrangement made to encourage his cooperation with Dr. Price's evaluation. The letter proposed March 7, 2016, as a return-to-work date and scheduled a February 10, 2016, drug screening, one of Dr. Price's conditions. Neither Alston nor his counsel responded to the letter, and Alston did not appear for the drug screening. Alston's paid leave was subsequently terminated because the Town had conditioned it on his cooperation; he was instead placed on sick leave.

***

A subsequent second proposed return-to-work date (and related drug screen) was similarly ignored by Alston. On August 17, 2016, the Town Administrator wrote to Alston notifying him that his termination was contemplated and that a hearing would be held before an outside hearing officer on August 30, 2016. The reason given for Alston's contemplated discharge was his inability to show that he could perform the essential functions of his job as a firefighter without accommodations or with accommodations to which he would agree….

***

At the pre-termination hearing, Alston did not testify and his attorney did not submit exhibits other than an unsworn written statement that Alston read into the record. Town Counsel offered to suspend the hearing if Alston contended that he had the capacity to return to work, provided that he participate in a fitness for duty evaluation. Alston declined the offer. The hearing officer's final report recommended Alston's termination. On October 5, 2016, the Select Board considered the hearing officer's report at a meeting and voted to terminate Alston's employment. This suit was about ten months old when he was terminated."

Holding:

"The Town allowed Alston an extended time on paid leave to entice his cooperation with a psychiatric evaluation. The paid leave was ended only after Alston's continued refusals to cooperate with the return- to-work process, and his ultimate termination was only sought after months of his (and his lawyer's) refusals to comply with conditions for return to work suggested by both examining psychiatrists.

As a result, Alston was placed on leave pending an investigation into the incident. The investigation included obtaining an evaluation of Alston's 'fitness for duty' by a psychiatrist retained by the department, Dr. Andrew Brown. After interviewing Alston and consulting with Dr. Kahn, Dr. Brown in substance recommended that Alston not be returned to duty until a stable plan for addressing his anger and potential for outbursts was put in place.

***

There is no direct evidence of racial discrimination here; Alston's claims are that the defendants, while ostensibly acting without discriminatory intent, were actually purposefully punishing him for his complaints about their racially discriminatory practices or omissions."

Legal Lessons Learned: The Town wisely proposed a return-to-work plan and provided adequate time for completion of the plan.

File: Chap. 16, Discipline

CA: PROBATIONARY FF – FIRED DURING 1-YR PROB. PERIOD – NO RIGHT TO CIVIL SERVICE HEARING

On April 24, 2020, in Josh McCauley v. City of San Diego, the California Court of Appeal (Fourth Appellate District / Division One) held (3 to 0) in unpublished opinion, that the trial court properly granted the City's motion to dismiss. Probationary firefighters have no civil service protection, are not covered by the Collective Bargaining Agreement, and Fire Academy Manual is not a contract of employment. Court did not discuss why he was fired, other than: "He met with the Department Chief to discuss the failure to be hired permanently. The City's attorney represented that McCauley had filed an internal grievance during his employment and it was addressed by the City."

"McCauley acknowledges that he is not a party to any collective bargaining agreement. He claims that the Department's Basic Fire Academy Manual (Manual) constituted "an express written contract 'with the City that governed the terms of his probationary status. He attaches a copy of the Manual to his complaint, but neither in his complaint nor in his brief on appeal does he identify any portion of that Manual that governs his probationary employment.

***

Again, the plain, unambiguous words of the Manual refer only to recruits, not to probationary employees. The Manual mentions termination from the Basic Fire Academy, but nothing about probationary employees

or the guarantee of a permanent job. The Manual provides neither conditions for permanent employment not entitlement to government employment. McCauley has not identified any regulations of the City or of the Department under which he could state an alternate claim."

Facts:

"He met with the Department Chief to discuss the failure to be hired permanently. The City's attorney represented that McCauley had filed an internal grievance during his employment and it was addressed by the City."

Holding:

"McCauley refers again to the Basic Fire Manual, as he has told us that no civil service protections or collective bargaining agreement apply to him and has never identified any other regulations or ordinance applicable to him. The Manual does not set out the terms and conditions of his probationary employment."

Legal Lessons Learned: Probationary firefighters are not covered by civil service or CBA.

Note: Court described the limited legal remedies of a probationary firefighter.

"McCauley had other remedies to pursue employment-related wrongs. 'A probationary employee may not be rejected for the exercise of a constitutional right [citation] for engaging in an activity protected by labor statutes.' (Trustees of Cal. State University v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1107, 1130; Bogacki, supra,5 Cal.3d at p. 778.) He had statutory rights including the right to pursue a discrimination claim under the Fair Employment and Housing Act and the right to workers' compensation in case of injury."

File: Chap. 16 – Discipline

NY: BULLYING – VOL. FF SUSPENDED – FIRED WHEN WALKED OUT AT START OF PRE-DISCIPLINAY HEARING

On April 23, 2020, in Andrew Lerer v. Raymond Canario, & Village of Spring Valley, & Spring Valley Fire Department, U.S. District Court Judge Louis Briccetti, United States District Court for the Southern District of New York, granted the defendants' motion to dismiss. The volunteer firefighter, who filed this lawsuit *pro se* [without an attorney], showed up for his termination hearing at 6:53 pm, but walked out before it started at 7:00 pm.

"Once an employer has knowledge of some type of workplace harassment or improper conduct, 'the law imposes upon the employer a duty to take reasonable steps to eliminate it.' Torres v. Pisano, 116 F.3d 625, 636 (2d Cir. 1997). Under the circumstances, that defendants provisionally denied plaintiff, pending a hearing and determination, access to municipal property and opportunities to respond to fire alarms or otherwise participate in SVFD activities does not plausibly suggest defendants exercised governmental power without a reasonable justification in the service of a legitimate governmental interest.

Facts:

"Plaintiff is a former volunteer firefighter at the SVFD. He served as a SVFD volunteer firefighter from 'approximately 2002 through 2009, and from approximately 2014 through January 2019.' … By letter dated November 26, 2018, and signed by Canario, the Chief of the SVFD (the 'suspension notice'), plaintiff was suspended from all activities of the SVFD pending an investigation and hearing…. The suspension was based on allegations that plaintiff 'bullied a fellow member of the [SVFD]' and 'creat[ed] a hostile environment in the workplace.'(Id.).

***

Attached to plaintiff's opposition is what appears to be a transcript of the suspension hearing, which suggests plaintiff arrived at 6:53 p.m., left at approximately 7:05 p.m., and thereafter the hearing proceeded without plaintiff. (Id. Ex. D at ECF 23). The hearing officer heard from one witness, a fire captain, during the suspension hearing.

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Here, plaintiff fails plausibly to state actionable procedural due process claims. He was provided a suspension notice and an opportunity to be heard before an impartial hearing officer prior to his termination from the SVFD membership rolls. He appeared for the suspension hearing, but left before it began, abandoning his opportunity to present evidence, question witnesses, and otherwise participate at the hearing. And following the hearing and his subsequent termination, plaintiff had an opportunity to commence a full adversarial proceeding under Article 78, but failed to do so."

Holding:

"'Pursuant to General Municipal Law § 209-l, volunteer firefighters cannot be removed from office or membership for incompetence or misconduct, except for absenteeism at fires or meetings, unless they are afforded a hearing.' Pawlowski v. Big Tree Volunteer Firemen's Co., 12 A.D.3d 1030, 1031 (4th Dep't 2004) (citing N.Y. Gen. Mun. L. § 209-l(3)). Such hearing must be held 'upon due notice and upon stated charges and with the right to such officer or member to a review pursuant to article seventy-eight of the civil practice law and rules.' N.Y. Gen. Mun. L. § 209-l(3). The notice 'shall specify the time and place of such hearing and state the body or person before whom the hearing will be held,' id. § 209-l(4)(b), and 'shall be served personally upon the accused officer or member at least ten days but not more than thirty days before the date of the hearing." Id. § 209-l(4)(c).

However, the provisions of Section 209-l do 'not affect the right of members of any fire company to remove a volunteer officer or voluntary member of such company for failure to comply with the constitution and by-laws of such company.' N.Y. Gen. Mun. L. § 209-l; see also Ratajack v. Brewster Fire Dep't. Inc. of Brewster-Southeast Joint Fire Dist., 178 F. Supp. 3d 118, 141-42 (S.D.N.Y. 2016) (noting 'New York courts have made clear that the hearing guarantee contemplated by § 209-l(3) does not apply when charges are brought pursuant to a fire company's bylaws')."

Legal Lessons Learned: Fire Chief acted promptly in suspending the firefighter; when he walks out of his pre-termination hearing he can hardly complain about lack of due process.

File: Chap. 16, Discipline

UT: RAPE AT FIRE STATION - ASSISTANT FIRE CHIEF ARRESTED – ALSO ALLEGEDLY RAPED FF -TOWN IMMUNITY

On April 22, 2020, in Whitney Otteley v. Austin James Corry and Kanosh Town, Utah, U.S. District Court Judge David Nuffer, U.S. District Court for the District of Utah, granted the Town's motion to dismiss. Under state law, the Town enjoys governmental immunity, and cannot be sued for "negligent hiring, supervision, or retention." The lawsuit against Austin Corry was not dismissed. [See TV Video about new charges - Austin Corry rapes of an duty firefighter. Austin Corry's father, the Fire Chief, was charged and pled guilty to obstruction of justice for not reporting her rape complaint to police.]

"Under the [Governmental Immunity Act of Utah]GIA, as applied in *Larsen* [*v. Davis County School District*, Utah Court of Appeals, Nov. 30, 2017;] and explained above, Kanosh is immune from suit because Austin Corry's misconduct (including his assault, battery, false imprisonment, and infliction of mental anguish on Ottley) was a proximate cause of Ottley's claimed injury.[42] Because of this, Ottley fails to state a claim against Kanosh on which relief may be granted as a matter of law."

Facts:

"In November 2016, Defendant Corry was employed as the Assistant Fire Chief of the Kanosh Fire Department. At that time, Austin Corry's father, Scott Corry, was the Fire Chief with direct supervisory authority over Austin Corry. Scott Corry was also employed by the Millard County Sheriff's office as a Sergeant and, in that capacity, was tasked with conducting any criminal investigations involving the Fire Department. In November 2016, Assistant Fire Chief Corry placed an order with Ottley for baked goods. He then lured her to the Fire Department under false pretenses (by claiming that he could not pick up the baked goods he had ordered but required them to be delivered to him). Assistant Fire Chief Corry then invited Ottley into the building. After she had entered, he locked the door behind her and proceeded to physically overpower and rape her."

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[From Plaintiff's Oct. 22, 2019 Complaint]

"Upon knocking on the Fire Station door, Plaintiff was let in by Assistant Fire Chief Corry. He locked the door behind her and told her 'this will only take a minute.' After the door was locked behind her, Plaintiff discovered that they were alone in the Fire Station. Assistant Fire Chief Corry then grabbed Plaintiff by the throat and proceeded to force her past an office area to where a flatbed fire truck was parked. Without releasing her, Corry forced Plaintiff up onto the back of the fire truck. Corry kept repeating a mantra of 'this will only take a minute.' Corry ripped off Plaintiff's pants and raped her. The entire time from when Corry first grabbed her until he allowed her to leave after he had finished raping her, Plaintiff was crying and repeatedly telling Corry 'no.' Assistant Fire Chief Corry disregarded Plaintiff's protests and continued his assault."

Holding:

"Kanosh argues that Ottley's claim should be dismissed because (1) the court lacks jurisdiction due to Ottley's failure to comply with the one-year notice of claim requirement set by the Governmental Immunity Act of Utah (GIA), and because (2) Kanosh is immune from Ottley's claim. Additionally, Kanosh maintains that (3) Ottley cannot recover some of the relief she seeks even if Kanosh is not immune.

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Because Kanosh is immune even if Ottley's notice of claim was timely, only Kanosh's second argument is addressed here. A determination of governmental immunity under the GIA requires a three-step analysis. First, the court determines 'whether the activity undertaken is a governmental function.' Second, the court considers 'whether governmental immunity was waived for the particular activity.' 'Finally, [the court] look[s] to see whether immunity has been reinstated through a statutory exception to the immunity waiver.'

***

As Kanosh points out, *Larsen v. Davis County School District* addressed this provision in the context of a former student's claims against a school district for alleged negligence in hiring, supervising, and retaining a teacher alleged to have engaged in sexual misconduct with the student. *Larsen* makes it clear that the critical question is 'whether an immunity-invoking condition (e.g., assault or battery) is at least 'a proximate cause' of the claimed injury.' '[I]f that question must be answered in the affirmative, the [governmental entity] is immune from suit.'"

Legal Lessons Learned: This is terrible conduct by both the Assistant Chief and his father, the Fire Chief. [Not found any articles on outcome of former Assistant Chief's trial.]

Note: See Dec. 3, 2019 article, "Millard County fire chief charged with raping two women will face trial in Utah County,". "The [raped firefighter] also reportedly told Corry's father, Scott Corry, 62, about the alleged rapes in 2018. However, Scott Corry told investigators he was "trying to protect his son and he never got around to" filing reports on the claims. He was charged in July with obstruction of justice, a second-degree felony, and official misconduct, a class B misdemeanor."

File: Chap. 16, Discipline

CA: THREATENING COMMENTS TO OFFICER – OFF DUTY INCIDENT WITH HIS DOG – 48-HOUR SUSPENSIONS UPHELD

On April 22, 2020, in Michael Meoli v. San Diego Civil Service Commission, the Court of Appeal (4th Appellate District / Division One) held (3 to 0) in unpublished opinion, that the trial court properly confirmed the decision of the Civil Service Commission, that the two 24-hour suspensions were appropriate.

> "[California Firefighter's Bill of Rights] Government Code section 3253 deals with a firefighter's rights when he or she 'is under investigation and subjected to interrogation.' Meoli argues that City violated subdivisions(b), (g), and (h) of section 3253 during the February 2012 incident at the fire station. As we explained ante, the trial court found that the delivery of the Notice communicated to Meoli that an investigation and interrogation would take place in the future. Although Meoli acknowledges this ruling by the trial court, he argues that it was 'not supported by the law or any reasoned analysis of the applicable statute[].' However, Meoli does not explain this alleged error, since he fails to discuss the trial court's rulings, the applicable standard, or the evidence to support a violation of the applicable standard."

Facts:

> "February 3, 2012, at the request of the Department's professional standards unit, the chief from a battalion other than the one to which Meoli was assigned served Meoli with a notification of fact-finding. Meoli's in-station captain joined the battalion chief as the chief provided Meoli with a copy of the notification and read it to him. After Meoli signed the notification, he and the battalion chief exchanged a few words before the chief told Meoli that the conversation was over. Meoli continued the communication, including physical contact with the battalion chief, and concluded with a statement that the chief 'took ... as a verbal threat.'
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> Because he 'felt ...verbally and physically threatened,' the visiting battalion chief called in the shift supervisor on duty and Meoli's battalion chief. When they arrived, the visiting battalion chief explained to the two others what had happened, and the shift commander made the decision to—and did—suspend Meoli immediately based on the City's zero tolerance policy regarding threats.
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> [The January 2013 Dog Park Incident.]
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> In January 2013, CherylM., a retired City police officer, was walking her dogs at Canyonside Community Park in the Rancho Peñasquitos area of San Diego. She had been at the park for approximately a half hour when she first saw Meolin with his dog off-leash—i.e., a dog she described as a 'very large pit bull' weighing approximately 150 pounds. Cheryl was 'on alert' because Meoli was 'trying to call [his dog]and get control of it, and it wasn't paying attention.' At that time, Cheryl 'ventured way out and looped around ...to avoid having any contact with [Meoli's] dog' as she attempted to return to her car. As Cheryl continued on her alternate route, Meoli's dog 'rushed' her, crossing a ball field 'at a full run through the open gate' and

coming within inches of her. The dog remained in front of Cheryl 'for maybe a good 30 seconds' before Meoli caught up to them. His dog's hackles were raised—which she understood to mean the dog was 'angry,' 'nervous' and 'insecure.' Cheryl was 'frozen,' asking Meoli multiple times to leash his dog; but he stayed approximately five yards away, pacing in a semi-circle and telling her to 'Just relax. Calm down.' Meoli did nothing to contain his dog, which was 'locked right onto' Cheryl, such that each time she made a step, the dog would move with her, not letting her pass.

A man driving a white pickup truck stopped next to them, saw that Cheryl was 'in some sort of trouble,' and yelled to Meoli multiple times to leash his dog. Meoli did not leash his dog, instead heading in the direction of the man from the pickup truck. The men argued: The man from the pickup truck told Meoli that, if he (Meoli) did not leash his dog, he (the man from the pickup truck) would call the police—to which Meoli responded,"' Don't bother. I am the police'; and the man from the pickup truck asked for Meoli's name and badge number—which, Cheryl testified, a police officer must provide upon request—but Meoli did not respond. As the two men argued, Cheryl left with her dogs."

Holding:

[At the Civil Service Commission hearing] after receiving oral and documentary evidence, the Hearing Officer issued a 19-page ruling with attached exhibits, and the Commission ratified the Hearing Officer's findings and conclusions in October 2016. The Commission concluded that Meoli 'was afforded due process and that the two 24-hour suspensions were appropriate, fully warranted, and justified' based in part on the following findings of the Hearing Officer: 'Meoli' was not credible in his explanation of the events' from either of the two incidents.

***

Meoli has not met his burden of establishing reversible error."

Legal Lessons Learned: Threats against a FD officer are not to be tolerated; nor claims off duty that you are a police officer.

Chap. 16, Discipline

VA: SOCIAL MEDIA - ANTI-TRUMP FACEBOOK - ARRESTED D.C. PROTEST – FIRED NO HEARING – LAWSUIT PROCEED

On March 31, 2020, in Rosa Roncales v. County of Henrico, Anthony McDowell, Alec Oughton, Scotty Roberts and Eugene Gerald, U.S. District Court Judge M. Hannah Lauck, U.S. District Court for the Eastern District of Virginia (Richmond Division), reviewing the allegations by the firefighter in the Complaint, but without holding a hearing, denied qualified immunity claims of the four supervisors. "At this procedural posture, however, the Court concludes that qualified immunity does not protect McDowell, Oughton, Roberts, or Gerald from liability. The Court will deny the Motion to Dismiss as to the individual Defendants." The County was dismissed from the case.

"Here, Roncales alleges that she never received a name-clearing hearing or the opportunity to present her case before her employment ended at the Henrico Fire Department. Specifically, Roncales claims that Defendants questioned her regarding her participation in a political protest, that she did not have the opportunity to speak to her legal counsel before questioning, that video evidence existed that would have shown she participated in only non-violent protest, that she 'told her superiors that her legal counsel had possession of a video demonstrating" the veracity of her claims, (Compl. ¶ 34), and that Defendants used the

event as a pretext to terminate her employment from the Henrico Fire Department for her political beliefs. For this claim, Roncales maintains that she was 'deprived of the fair and unbiased opportunity for a hearing, whether name-clearing or otherwise, to rebut the Defendants' representations, and to present her side of the story.' (Compl. ¶ 60.) Based on these allegations, Roncales sufficiently alleges her Due Process Claim."

Facts:

"The events leading to Roncales's April 2017 termination began in November 2016, shortly after the election of President Donald Trump. (Id. ¶ 12.) Roncales states that in November 2016 she 'posted a graphic on her personal Facebook page severely critical of the incoming administration.' (Id.) According to Roncales, Robert Owens and Ronnie Thomas, her supervisors at the Henrico Fire Department, warned her "to be careful" about what she posted on social media.' (Id. ¶ 13.) Owens and Thomas shared the post with Roncales's chain of command, including the individual Defendants, McDowell, Oughton, Roberts, and Gerald. (Id.) ' Soon thereafter, [her] Facebook post was disseminated and spread among members of the [Henrico Fire Department]." (Id. ¶ 1). *** Approximately two months later, on January 20, 2017, Roncales says she 'participated in a political march and rally in Washington, D.C., along with thousands of other participants, in opposition to the inauguration of Donald Trump.' … Roncales states that she 'attended the protest on her own time and wore no clothing or other markings that would identify her' as a Henrico County firefighter…. During that event she was 'swept up in a large-scale arrest of several hundred people by the D.C. Metropolitan Police Department and, subsequently, charged with several offenses.' … The D.C. Metropolitan Police Department later dismissed the charges against Roncales. [After internal FD investigation, and questioning about her political protest activities, was fired April 4, 2017.]

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Roughly two months later, on April 4, 2017, Roncales met with McDowell and Oughton. (*Id*. ¶ 32.) During that meeting, McDowell told Roncales that 'he believed there were discrepancies between what she told [Roberts and Gerald] and the information provided by the D.C. Metropolitan Police Department.' (*Id*. ¶ 33.) Either McDowell or Oughton then told Roncales that the police 'had a video of her watching the windows of a McDonalds being broken by protesters.' (*Id*. ¶ 34.) Roncales told McDowell and Oughton that the allegation was not true and that 'her legal counsel had possession of a video demonstrating that was not true.' (*Id*.) McDowell and Oughton responded that 'they did not believe her.' (*Id*. ¶ 35.)

Roncales claims that McDowell and Oughton asked her why she tried to disguise herself during the protest. (*Id*. ¶ 36.) In response, Roncales explained that she 'wore simple, nondescript black clothing because she feared being 'doxxed,' which is a term used to describe the research and publication of personal details so others can target and harass the individual." (*Id.*) McDowell then terminated Roncales and told her that "her actions 'had made things harder for female firefighters.'" (*Id*. ¶ 37.) That same day, McDowell sent an email to the Henrico Fire Department, informing the department that Roncales had been terminated. (*Id*. ¶ 38.)."

Holding:

"The Court finds, at this procedural posture, that Roncales has stated a First Amendment Retaliation Claim as to Oughton, Roberts, and Gerald. As Defendants summarize, 'Roncales alleges that all Defendants presumed her dishonesty, subjected her to an investigation, subjected her to successive interrogations under the threat of termination, questioned her political affiliations and viewpoints, made findings as part of an administrative investigation, and falsely stated that she was dishonest without providing her due process.' (Mem. Supp. Mot. Dismiss 18.) These actions, taken together, indicate that Oughton, Roberts, and Gerald may have taken adverse actions against Roncales for her protected political speech, that they so acted because of her political views, and that a causal relationship existed between Roncales's engagement in constitutionally protected activity and their conduct. As a result, the factual allegations in the Complaint, viewed as a whole, have facial plausibility sufficient to state a First Amendment Retaliation Claim. *Iqbal*, 556 U.S. at 678.

For the statements of a public employee, such as Roncales, to receive First Amendment protection, the public employee must speak as a citizen and address matters of public concern. *Grutzmacher v. Howard County*, 851 F.3d 332, 344 (4th Cir. 2017). 'Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Id*. at 343 (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc)) (discussing when Facebook activity, a recognized form of speech, pertains to issues of public concern that may qualify it for First Amendment protection)."

Legal Lessons Learned: FDs should provide a pre-disciplinary hearing prior to making a termination decision. See U.S. Supreme Court decision in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

Chap. 17: Arbitration

TX: HOUSTON FD – 3 FFs FAILED PARAMEDIC SCHOOL – FIRED, NO ADMIN APPEAL - ARBITRATOR ORDERS RE-HIRED

On March 31, 2020, in City of Houston v. Houston Professional Fire Fighters' Association, Local 341, the Texas Fourteenth Court of Appeals held (3 to 0) that the trial court properly upheld the Arbitrator's decision. The grievance was filed after the FD in 2014 for the first time fired three permanent, non-probationary firefighters without an administrative appeal "for failure to achieve paramedic certification." The arbitrator held that the grievance was filed timely, that the FD changed a working condition in breach of the CBA, and the appropriate remedy was reinstatement of three firefighters.

"The City asserts the arbitrator had no jurisdiction to order reinstatement of the terminated employees because the CBA did not specifically grant the arbitrator the authority to reinstate…. Texas courts likewise have reached the conclusion that 'an arbitrator has broad discretion in fashioning an appropriate remedy.' Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc., 446 S.W.3d 58, 82 (Tex. App.—Houston [1st Dist.] 2014), aff'd,518 S.W.3d 422 (Tex. 2017); see Daniewicz v. Thermo Instrument Sys., Inc., 992 S.W.2d 713, 718 (Tex. App.—Austin 1999, pet. denied)('[A]rbitrators have traditionally enjoyed broad leeway to fashion remedies.'). In the CBA, the parties do not prohibit reinstatement as a remedy. The common-law grounds for vacating an arbitration award are exceedingly narrow and do not include an arbitrator's error in applying the law. See Jefferson Cty., 546 S.W.3d at 674.We conclude that the arbitrator did not exceed her authority in ordering reinstatement of the terminated employees."

Facts:

"The grievance read as follows:

'The City of Houston has unilaterally changed the working conditions of certain Houston firefighters by unilaterally implementing new job requirements regarding paramedic credentialing. Specifically, the City is now requiring members to successfully complete paramedic school, paramedic certification from the Texas Department of State Health Services (TDSHS), and be credentialed by a Physician Director as a Paramedic.'

The arbitrator ultimately found:

'Therefore, we find that . . . the working conditions were changed because the consequences of failing to qualify now resulted, for the first time, in termination without hearing rights. We find that this indeed violated Article 5, Maintenance of Standards.

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The trial court rendered summary judgment confirming an arbitration award in favor of appellee Houston Professional Fire Fighters' Association, Local 341 (the Association) and dismissing a declaratory judgment action appealing the arbitration award brought by appellant City of Houston.

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The grievance procedure outlined in CBA article 14 provided that the Association was required to file a grievance within 30 days of the date 'upon which the association knew or should have known of the facts or events giving rise to the grievance.' The City asserts the Association knew or should have known of the facts underlying its grievance as early as October 29, 2014, but did not file its grievance until January 14, 2015.

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The City concludes that, in ruling that the grievance was timely, the arbitrator exceeded her authority under the CBA, as the untimeliness of the grievance deprived the arbitrator of jurisdiction under the CBA's grievance procedures, which state that no further action may be taken if a grievance is not timely filed.

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The plain language of this provision encompasses the terms in CBA article 14 concerning when a grievance must be filed, placing it squarely within the arbitrator's authority to determine the fact-bound question of whether the grievance was timely. See Jefferson Cty., 546 S.W.3d at674 ('The arbitrator's analysis . . .may or may not be correct, but it is precisely within the scope of his contractual authority to resolve '[a]ll disputes concerning the proper interpretation and application of' the CBA.')."

Holding:

"We accordingly conclude that the arbitrator did not exceed her authority by deciding the timeliness issue. *** We conclude that the arbitrator did not exceed her authority in ordering reinstatement of the terminated employees."

Legal Lessons Learned: Arbitrators have broad authority to determine timeliness of a grievance, and appropriate remedy for breach of CBA.